159 U.S. 540

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 286.

THE WINONA & ST. PETER LAND COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED JULY 18, 1891.

(14,752.)

(14,752.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 236.

THE WINONA & ST. PETER LAND COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

INDEX.

	Original.	Print.
Citation and proof of service of same	1	1
Writ of error	3	2
Petition for writ of error	6	3
Assignment of errors	10	5
Bond on writ of error	13	7
Certificate of judge of district court	17	8
Findings of fact	18	9
Conclusions of law	22	11
Memoranda	24	12
Order to transmit cause to supreme court of Minnesota	26	13
Exhibit W—Agreement between A. H. Barney *et al.* and the Winona and St. Peter R. R. Co., Oct. 31, 1867	26	14
A—Answer of the Winona and St. Peter Land Co	40	22
E—Final decree of United States circuit court in case of Barney *et al. vs.* Winona and St. Peter R. R. Co	44	24
Syllabus	47	25
Opinion	48	25
Order to show cause	50	26
Affidavit of J. A. Tawney	51	27
Order modifying decision	54	29
Judgment	55	29
Clerk's certificate	57	30

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 8, 1894.

1 UNITED STATES OF AMERICA:

To the State of Minnesota and its attorneys, Moses E. Clapp; Lind & Hagberg:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at Washington, D. C., on the 29th day of July, A. D. 1891, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The State of Minnesota is defendant in error and The Winona & St. Peter Land Company is plaintiff in error, and to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done in that behalf.

Witness the Honorable James Gilfillan, chief justice of the State of Minnesota, this 30th day of June, A. D. 1891.

JAMES GILFILLAN,
Chief Justice Supreme Court Minnesota.

STATE OF MINNESOTA, } ss:
County of Winona, }

James A. Tawney came before me personally and, being first duly sworn, doth depose and say that he is the attorney for the plaintiff in error in the above-entitled action; that the firm of Lind & Hagberg, attorneys-at-law, residing in the city of New Ulm, county of Brown, together with Hon. Moses E. Clapp, appeared for the defendant in error in said action in the district court and the supreme court of the State, and that on the 6th day of July, A. D. 1891, affiant served upon said firm of Lind & Hagberg the foregoing citation issued in said action by depositing a copy thereof in the post office at the city of Winona, in an envelope securely sealed, addressed to said Lind & Hagberg at their said residence, with full postage prepaid.

JAMES A. TAWNEY.

Subscribed and sworn to before me this 6th day of July, 1891.

[Notarial Seal, Winona Co., Minn.]

WECK J. SMITH,
Notary Public, Winona County, Minn.

2 [Endorsed:] United States of America. Supreme court. The State of Minnesota, defendant in error, *vs.* The Winona & St. Peter Land Company, plaintiff in error. Citation. Due service of the within citation is hereby admitted this 10th day of July, A. D. 1891. Moses E. Clapp, att'ys for defendant in error. J. A. Tawney, att'y for pl'ff in error, Winona, Minn.

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said supreme court of the State of Minnesota, before you or some of you, being the highest court of law or equity in which a decision could be had in a said suit between the said State of Minnesota, plaintiff and defendant in error, and The Winona & St. Peter Land Company, defendant and plaintiff in error, wherein is drawn a question of construction of a clause of the Constitution of the United States, and also wherein is drawn in question the validity of an authority exercised under a statute of the State of Minnesota, which was and is claimed to be repugnant to the Constitution of the United States, and the decision was against the title, right, privilege, immunity, and exemption specially set up or claimed under such clause of the Constitution and in favor of such authority, a manifest error hath happened, to the great damage of the Winona & St. Peter Land Company, as by its petition and pleadings appear, we, being willing that the error, if any hath happened, should be duly corrected and full and speedy justice be done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with anything concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 29th day of July, A. D. 1891,

4 in the said Supreme Court, that, the record of the proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 30th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

[Seal U. S. Circuit Court, Third Division, Dist. of Minnesota.]

OSCAR B. HILLIS,
Clerk of the Circuit Court of the United States for the District of Minnesota.

STATE OF MINNESOTA, }
County of Winona, } *ss:*

James A. Tawney came before me personally, and, being first duly sworn, doth depose and say that he is the attorney for the plaintiff in error in the above-entitled action; that the firm of Lind & Hagberg, attorneys-at-law, residing in the city of New Ulm, county of Brown, together with Hon. Moses E. Clapp, appeared for the defendant in error in said action in the district and supreme court of the State, and that on the 6th day of July, A. D. 1891, affiant served upon said firm of Lind & Hagberg the foregoing

writ of error issued in said action by depositing a copy thereof in the post office, at the city of Winona, in an envelope, securely sealed, addressed to said Lind & Hagberg at their said residence, with full postage prepaid.

JAMES A. TAWNEY.

Subscribed and sworn to before me this 6th day of July, 1891.

[Notarial Seal, Winona Co., Minn.]

WECK J. SMITH,
Notary Public, Winona Co., Minn.

5 [Endorsed:] United States of America, Supreme Court. The State of Minnesota, defendant in error, *vs.* The Winona & St. Peter Land Company, plaintiff in error. Writ of error. Due service of the within writ of error is hereby admitted this 10th day of July, A. D. 1891. Moses E. Clapp, attorney for def't in error. J. A. Tawney, att'y for pl'ff in error, Winona, Minn.

6 STATE OF MINNESOTA:

Supreme Court.

THE STATE OF MINNESOTA, Defendant in Error,
vs.
THE WINONA & ST. PETER LAND COMPANY, Plaintiff in Error.

To the Honorable James Gilfillan, chief justice of the supreme court of the State of Minnesota:

The petition of the Winona & St. Peter Land Company respectfully shows that on the 19th day of July, A. D. 1889, the supreme court of the State of Minnesota, in and by the final judgment entered thereof on that day, in a certain action, wherein The State of Minnesota was plaintiff and your petitioner was defendant, affirmed in part a judgment made in that action or proceeding by the district court for the county of Brown, in said State, in favor of said plaintiff and against said defendant, and entered in said district court on the 19th day of September, A. D. 1888, which judgment of said supreme court finally and conclusively adjudicates and determines that said plaintiff is entitled to recover from the lands described in the complaint in said action and owned by said defendant all the taxes assessed and levied against the same for six years prior to the date of the commencement of said action, subject only to a review by the Supreme Court of the United States, as will more fully appear by reference to the records and proceedings in said action; that the taxes so levied and included in said

7 judgment against the lands of said defendant amount in the aggregate to twenty-four thousand three hundred ninety and fifty-seven $\frac{1}{100}$ dollars ($24,390.57).

That said supreme court of the State of Minnesota is and then was the highest court in said State in which a decision in said action could be had; that your petitioner claims the right to re-

move said judgment to the Supreme Court of the United States by a writ of error under section 709 of the Revised Statutes of the United States, because in said action a title, right, privilege, and immunity was claimed by your petitioner in bar of said action under the fifth amendment to the Constitution of the United States and under section ten of article one of the Constitution of the United States—that is to say, there was pleaded and proven as a defence in said action certain acts of Congress granting certain lands to the State of Minnesota to aid in the construction of certain railroads in said State and a certain contract between the Territory (now State) of Minnesota and the Transit Railroad Company by it created and one of the railroad companies entitled to a portion of the lands so granted by Congress, whereby said lands were and should thereafter be exempt from taxation until sold and conveyed by said company.

That thereafter the Winona & St. Peter Railroad Company, a corporation duly created under and by virtue of the laws of said State, duly succeeded to and became possessed of the rights, benefits, property, franchise, and interests of the said Transit Railroad Company, including that to said lands and the contract of exemption aforesaid.

8 That said lands were conveyed to your petitioner, and your petitioner obtained title thereto from said last-named railroad company, the same having been certified to the State for its benefit under said acts of Congress, and that the taxes included in said judgment against said lands were all assessed and levied prior to said conveyance by said railroad company to your petitioner; that the enforcement of the said taxes against said lands and the authority of said State and the tax laws thereof is in violation of said contract and an impairment thereof, contrary to the section and article of the Constitution of the United States last referred to, and your petitioner is advised and verily believes that such consideration, faith, and credit was not given to said provisions of the Constitution of the United States and to the said contract between the said State of Minnesota and the said railroad company by the said judgment of the supreme court of the State of Minnesota as their provisions expressly require, all of which will more fully appear by the records and proceedings in said action, to which reference is hereby made.

Wherefore your petitioner prays the allowance of a writ of error, returnable to the Supreme Court of the United States, and for citation; and your petitioner will ever pray.

JAMES A. TAWNEY,
Attorney for Petitioner.

9 STATE OF MINNESOTA, }
County of Winona, } ss:

Henry W Lamberton came before me personally and, being duly sworn, doth depose and say that he is land commissioner of the defendant above named; that he has read the foregoing petition, and that the same is true to his own knowledge except as to the matters

which are herein stated on his information and belief, and as to those matters that he believes it to be true.

HENRY W. LAMBERTON.

Subscribed and sworn to before me this 27th day of June, A. D. 1891.

JAMES A. TAWNEY,
[SEAL.] *Notary Public, Winona County, Minn.*

The writ of error is hereby allowed as within prayed for.
Dated this 30th day of June, 1891.

JAMES GILFILLAN,
Chief Justice Supreme Court of Minnesota.

Endorsed: 5665. State of Minnesota supreme court. The State of Minnesota, defendant in error, *vs.* The Winona & St. Peter Land Company, plaintiff in error. Petition for writ of error. Due service of the within is hereby admitted this — day of ——, A. D. 1891. J. A. Tawney, att'y for pl'ff in error, Winona, Minn. Filed June 30, 1891. C. P. Holcomb, clerk.

10 The Supreme Court of the United States.

THE STATE OF MINNESOTA, Defendant in Error,
vs.
THE WINONA & ST. PETER LAND COMPANY, Plaintiff in Error.

In the matter of the petition of the Winona & St. Peter Land Company and owner of the lands referred to in the above-entitled action.

Assignment of Errors.

Now comes the Winona & St. Peter Land Company, a corporation and the owner of the land above referred to, by James A. Tawney, its attorney, and says that in the records and proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

That the assessment and taxation of the lands involved in said action is in conflict with section ten (10) of article two of the Constitution of the United States in this, that it violates and impairs the obligation of the contract existing between the Winona & St. Peter Railway Company and the State, whereby said lands were free and exempt from taxation until sold and conveyed.

II.

That the act of the legislature of the State of Minnesota under and in pursuance of which said lands were assessed and said taxes were levied is in conflict with the fifth amendment of the Con-
11 stitution of the United States, in that it authorizes the assessment and taxation of the property of the citizen without

notice to him and affords no opportunity to the owner of property to appear and be heard in or appeal from the assessment proceedings thereby authorized.

(*a.*) Under the act above referred to the officers of the several counties of the said State of Minnesota are authorized, and in certain cases it is made their duty, to assess and tax the property of the citizen without notice and without giving an opportunity to be heard, and, if the tax is not paid, such officers are authorized to sell the property for the taxes so assessed for past years, thus depriving the owner of his property without due process of law.

III.

That the county auditor of the county in which said lands are situated had no right to assess and tax the lands of said company.

IV.

That the supreme court of the State of Minnesota erred in holding the lands of said land company to be taxable immediately upon their conveyance by the State to the railroad company and in holding that the lands involved in this action are liable for all the taxes assessed and levied against the same for the six years next preceding the commencement of said action to enforce said taxes.

V.

That said supreme court likewise erred in holding that the
12 assessment and taxation of the property of the citizen under the act above referred to and without notice or the right to appear or appeal does not deprive the owner of his property without due process of law.

Wherefore the said Winona & St. Peter Land Company prays that the said judgment of the supreme court of the State of Minnesota be reversed, and for such other and further proceedings in the premises as may be by your honorable court deemed just and necessary.

JAMES A. TAWNEY,
Attorney for Defendant and Appellant.

Winona, Minnesota.

Endorsed: 5655. United States of America, Supreme Court. The State of Minnesota, defendant in error, *vs.* The Winona & St. Peter Land Company, plaintiff in error. Assignment of errors. Filed June 27, 1891. C. P. Holcomb, clerk. J. A. Tawney, att'y for pl'ff in error. Winona, Minn.

13 STATE OF MINNESOTA, } ss:
Supreme Court, }

THE STATE OF MINNESOTA, Defendant in Error,
vs.
THE WINONA & ST. PETER LAND COMPANY, Plaintiff in Error.

Know all men by these presents — we, The Winona & St. Peter Land Company, as principal, and M. G. Norton and Henry C. Balcom, as sureties, are held and firmly bound unto said defendant in error, The State of Minnesota, in the full and just sum of two thousand ($2,000) dollars; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 27th day of June, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas, at a general term of the said supreme court of the State of Minnesota, in a suit depending in said court between The State of Minnesota, as plaintiff and respondent, and The Winona & St. Peter Land Company, as defendant and appellant, judgment was rendered against said defendant, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing *them* to be and appear at the Supreme Court of the United States, at Washington, on the 29th day of July, A. D. 1891:

14 Now, the condition of the above obligation is such — if the said defendants shall prosecute its said writ of error to effect and answer all costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and effect.

THE WINONA & ST. PETER LAND COMPANY, [SEAL.]
[SEAL.] By HENRY W. LAMBERTON, [SEAL.]
Land Commissioner.
H. C. BALCOM. [SEAL.]
MATTHEW G. NORTON. [SEAL.]

STATE OF MINNESOTA, } ss:
County of Winona, }

Be it known that on this 27th day of June, A. D. 1891, before me, a notary public, personally appeared Henry W. Lamberton, land commissioner of the above-named defendant, and M. G. Norton and Henry C. Balcom, to me known to be the same persons described in and who executed the foregoing instrument, and each for himself acknowledged the same to be his own free act and deed.

JAMES A. TAWNEY,
[SEAL.] *Notary Public, Winona County, Minnesota.*

STATE OF MINNESOTA, } ss:
County of Winona, }

M. G. Norton and Henry C. Balcom, the persons named in and who executed the foregoing bond as sureties, being first duly sworn, do*th* depose and say that *he is* a resident and freeholder
15 of the State of Minnesota and worth the amount of two thousand ($2,000.00) dollars above *his* debts and liabilities and exclusive of *his* property exempt from execution.

MATTHEW G. NORTON.
H. C. BALCOM.

Subscribed and sworn to before me this 27th day of June, A. D. 1891.

JAMES A. TAWNEY,
[SEAL.] *Notary Public, Winona County, Minnesota.*

I hereby approve of the within bond and the sureties thereon. June 30, 1891.

JAMES GILFILLAN,
Chief Justice of the Supreme Court of Minnesota.

Endorsed: United States of America, Supreme Court. The State of Minnesota, defendant in error, *vs.* The Winona & St. Peter Land Company, plaintiff in error. Bond. J. A. Tawney, att'y for pl'ff in error. Winona, Minn. Filed June 30, 1891. C. P. Holcomb, clerk.

16 [Endorsed:] State of Minnesota supreme court. The State of Minnesota, respondent, *vs.* The Winona & St. Peter Land Company, appellant. Paper book. J. M. Gilman, appellant's attorney.
Endorsed: 5655. Filed Nov. 3, 1888. J. D. Jones, clerk.

17 STATE OF MINNESOTA:

Supreme Court.

STATE OF MINNESOTA, }
County of Brown. }

District Court, Ninth Judicial District.

THE STATE OF MINNESOTA }
vs.
THE WINONA & ST. PETER LAND COMPANY. }

To the honorable supreme court of the State of Minnesota:

This was a proceeding to enforce the payment of delinquent taxes, interest and penalty (which were assessed and are sought to be enforced under and in conformity to the general tax law, chapter eleven, General Statutes, 1878) upon certain lands in Brown county. The Winona & St. Peter Land Company having filed an answer in said proceedings as authorized by said statute, setting up its title to

certain of said lands, and its objection to the enforcement of said taxes against the same, and the matter having duly come on for hearing before me, and having been duly heard and considered and a decision rendered therein against said land company, and said land company having requested the facts in the case, and my decision thereon, to be certified to the said supreme court, pursuant to section 80 of said chapter 11:

Now, therefore, I hereby certify the following to be the facts in said proceedings:

18

I.

The assessment of the taxes sought to be enforced and the mode of enforcing the same are in conformity to the provisions of said chapter 11, General Statutes, 1878, and acts amendatory thereof.

II.

The Winona & St. Peter Land Company is a corporation duly organized and existing under the laws of this State, and said company is the owner of the lands set forth in its answer (amounting to many thousand acres), a copy of which answer (omitting therefrom the description of the lands and the verification) is hereto attached and made a part hereof, marked Exhibit "A."

III.

That said lands were acquired by the Winona & St. Peter Railroad Company as the successor to the Transit Railroad Company, under the act of Congress mentioned and referred to in said answer, and acts amendatory thereof, and of chapter two of an act of the late Territory of Minnesota, approved May 22, 1857, entitled, An act to execute the trust created by an act of Congress, entitled "An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in said State," and granting certain lands to railroad companies therein named, and acts amendatory thereof. That said section 4 of said chapter 2 of said territorial act, approved May 22, 1857,

19

turning said lands over to said railroad company, provides as follows: "The said lands so granted shall be and are exempt from all taxation until the same shall have been sold and conveyed by said company."

IV.

That on the thirty-first day of October, 1867, the said Winona & St. Peter Railroad Company, as party of the second part, entered into a certain agreement with Danford N. Barney *et al.*, as parties of the first part, for the sale by said railroad company to said parties of the first part, of certain of its lands acquired or to be acquired under said acts of Congress and acts of the late Territory

and present State of Minnesota, a copy of which agreement is hereto attached and made a part hereof, marked Exhibit "W," and that the lands described in the defendant's answer are a portion of the lands referred to in said agreement.

V.

That the State conveyed lands to said Winona & St. Peter Railroad Company, under said acts of Congress and said acts of the late Territory and present State of Minnesota, from time to time, as said railroad company became entitled to the same, and that the State conveyed the lands described in the defendant's answer to said railroad company prior to any of the years for which taxes are claimed thereon in said delinquent list. That the said Winona & St. Peter Railroad Company conveyed to the said Danford N. Barney and his associates, parties of the first part in said agreement, Exhibit "W," such of said lands as it admitted it was obligated to convey
20 under said agreement. That the said Danford N. Barney and his associates, parties of the first part of said agreement, claimed a large quantity of lands under said agreement which the railroad company disputed their liability to convey to them. That thereupon, in 1879, the said Barney and his associates, parties of the first part in said agreement, brought suit in the United States circuit court for the district of Minnesota, against the said Winona & St. Peter Railroad Company, to compel it to convey to them the lands to which they claimed to be entitled under said agreement, but which the said railroad company refused to convey, including the lands now owned by the said Winona & St. Peter Land Company, and involved in these proceedings. That said suit was pending in said circuit court and in the Supreme Court of the United States until March, 1887, when a final decree was rendered and entered in said cause in said circuit court, ordering and decreeing the said Winona & St. Peter Railroad Company to convey a large quantity of lands to the said Winona & St. Peter Land Company, at the request of and as the successor in interest under said agreement of the said Barney and his associates, parties of the first part therein, which final decree embraced the lands involved in these proceedings, which decree is hereby made a part of this statement of facts as Exhibit "E."

VI.

That none of said lands described in the delinquent list herein were ever assessed for taxes prior to the year 1886; but in 1886, under section 113 of said chapter 11 of the Laws of 1878, as amended by chapter 5 of the Laws of 1881, and by section 23, chapter 2,
21 Laws of 1885, which section as thus amended, now reads as follows: "If any real or personal property shall be omitted in the assessment of any year or years, and the property shall thereby escape taxation, when such omission shall be discovered the county auditor shall enter such property on the assessment and tax books for the year or years omitted, and he shall assess the same and extend all arrearage of taxes properly accruing against

such property, with seven (7) per cent. interest thereon from the time said taxes would have become delinquent, and the same shall be extended against such property on the tax-list for the current year. If any tax on the property liable to taxation is prevented from being collected for any year or years by reason of any erroneous proceedings or other cause, the amount of such tax which such property should have paid shall be added to the tax on such property for the current year;" taxes were assessed against all of said lands for each year subsequent to the date when the same were conveyed by the State to said Winona & St. Peter Railroad Company and subsequent to the execution of said agreement, Exhibit "W," including interest and penalty as provided in said section 113 and section 69, said chapter 11, and acts amendatory thereof. That taxes, interest and penalty were assessed against some of said lands for each year from 1869 to 1886, inclusive, and upon others from the year 1878 to 1886, and upon others from the year 1870, and upon others from the year 1881, being the respective dates when the lands were conveyed by the State to the said railroad company; that the amount of taxes, interest and penalty so assessed and sought to be enforced against the said lands of the said
22 Winona & St. Peter Land Company amounts in the aggregate to more than fifteen thousand dollars ($15,000).

VII.

That the legal title to said lands remained in said railroad company from the time when the same were conveyed by the State to said railroad company, down to the date of said decree in said circuit court, in March, 1887.

As conclusions of law from the foregoing facts the court finds:

First. That the provisions of section 4 of chapter 2 of the act of the legislative assembly of the Territory of Minnesota, entitled "An act to execute the trust created by an act of Congress, entitled 'An act making a grant of land to the Territory of Minnesota, in alternate sections, to aid in the construction of certain railroads in said Territory, and granting public lands, in alternate sections, to the State of Alabama, to aid in the construction of a certain railroad in said State;' and granting certain lands to railroad companies therein named," approved May 22, 1857, wherein it was provided that "the said lands so granted shall be and are exempted from all taxation till the same shall be sold and conveyed by said company," constituted a contract between the Territory of Minnesota and the Transit Railroad Company therein named, and that said Winona & St. Peter Railroad Company succeeded to all the rights, privileges, property, franchises and interest of said Transit Railroad Company, acquired under said act.

23 Second. That the legislature of the late Territory or present State of Minnesota has never passed any act rendering said lands or any portion thereof taxable until the same were sold and conveyed, nor in any manner violating the obligations of said contract contained in said act.

Third. That immediately upon the Winona & St. Peter Railroad Company's acquiring title to said lands described in the defendant's answer, the equitable title thereto under said agreement set forth in said Exhibit "W," passed to the parties of the first part. named in said agreement, or their successors, and said lands were then sold and conveyed within the meaning of said section 4 of chapter 2 of said act of the Legislative Assembly of said Territory of Minnesota, and from thenceforth said lands became and were taxable.

Fourth. That said lands described in said answer having been omitted in the assessment of taxes for all years prior to 1886, and having thereby escaped taxation for all years prior to 1886, the county auditor of said county properly entered the same on the assessment sheets and tax books and properly assessed the same and extended all arrearages which had accrued against the same, and that the tax penalty and interest named in said delinquent list against each piece and parcel of land described in defendant's answer has been impartially, fairly and equally assessed by said auditor for each of the years named in said delinquent list.

Fifth. That no taxes, penalty or interest can be recovered herein against the west half of the northeast quarter, west half of the southeast quarter, and the southwest quarter of section 27, and the southeast quarter of section 31, all in township 109, range 35.

Sixth. That the collection of the taxes, penalty or interest
24 against any of the lands described in the defendant's answer, for any of the years mentioned in said delinquent list, is not barred by the statute of limitations.

Seventh. That, except as hereinbefore set forth, each piece and parcel of land described in said answer of said Winona & St. Peter Land Company herein is liable for the amount of tax, penalty and interest specified in said delinquent list, for each year therein named and the costs allowed by law.

Eighth. That the amount of taxes, penalty and interest and costs to which each of said pieces or parcels of land is liable, as hereinbefore stated, is a lien upon each of said pieces or parcels of land as against the estate, right, title, interest, claim or lien of whatever nature, in law or equity, of every person, company or corporation whatsoever, and that unless the amount to which each of said pieces or parcels is liable be paid, each of said pieces or parcels is liable to be sold as provided by law, to satisfy such amount to which it is liable.

Let judgment be entered accordingly.

Dated Sept. 28, 1888.

B. F. WEBBER,
Judge of District Court, Ninth Judicial District.

Memoranda.

It is very doubtful whether the copy of the Barney contract (Ex. "W") was properly admissible in evidence under the rule laid down by the Supreme Court *In re* Gazett, 35 Minn., 582, but whether admitted or rejected the result will be the same. It is admitted that

the defendant is the owner of the land in question, and it
25 clearly appears from the decree of the United States circuit court in Barney *et al. v.* The Winona & St. Peter Railroad Company that the court decreed a specific performance of a contract and conveyance by the railroad company of the land in question to Barney *et al.* without the performance of any condition precedent on their part, and, hence, the equitable title to the land in question must have passed to Barney *et al.*, or their successors, prior to the date of the decree, March 7, 1887. The precise date at which the equitable title passed does not appear from the decree; but, as taxation is the rule and exemption the exception, it was incumbent on the defendant to show, affirmatively, facts which entitle its lands to exemption for all the years for which exemption is claimed, and, in the absence of such showing, it must be presumed that the lands were liable to taxation for all the years for which taxes are claimed.

Tubessing *vs.* City of Burlington, 24 N. W. Rep., 514.
St. Peter's Church *vs.* Board of Com., 12 Minn. (Gil.), 280–283.
Thompson *vs.* Tinkcom, 15 Minn. (Gil.), 226–229.

I have, therefore, considered the Barney contract in evidence in order that the parties may be in a position to have the real question in controversy determined by the supreme court if they so desire.

The penalty and interest claimed in the delinquent list is entered in a gross sum for each year upon each piece or parcel of land, and I am unable to understand by what method of computation the amounts of interest and penalty entered in the list were obtained.

Chapter V, General Laws, 1881, authorizes the collection
26 of interest at the rate of seven per cent. from the time taxes would have become delinquent, and it must be presumed that the amount claimed in excess of the rate is penalty. The defendant claims in its brief that the amount is excessive.

Section 75 of chapter XI, General Statutes, 1878, authorizes the answering defendant to state facts constituting the defense or objection to the tax or penalty. As the answer in this case states no defense to the amount of the tax or penalty, no question as to the correctness of the amounts claimed can be determined in this proceeding.

B. F. WEBBER, *Judge.*

The Winona & St. Peter Land Company, against which the court has decided certain points raised by its defense in the above-entitled proceeding, having duly applied to have the same transmitted to the supreme court, and the same being, in the opinion of the court, of great public importance, I hereby certify that the above and foregoing is a brief statement of the facts established bearing upon such points, and of the decision of the court thereon; and it is hereby ordered that the same be forthwith transmitted to the clerk of the supreme court of the State of Minnesota.

B. F. WEBBER,
Judge of District Court, Ninth Judicial District.

Dated October 22, 1888.

Exhibit "W."

Agreement Between A. H. Barney et al. and the Winona & St. Peter Railroad Company.

27 Memorandum of an agreement, made the thirty-first day of October, one thousand eight hundred and sixty-seven, by and between Danford N. Barney, Jessie Hoyt, Angus Smith, William G. Fargo, Benjamin P. Cheney, Charles F. Latham, Ashbel H. Barney, Samuel N. Hoyt, and Alfred M. Hoyt, parties of the first part, and the Winona & St. Peter Railroad Company, party of the second part:

Whereas, the said parties of the first part have, at and upon the request of the said party of the second part, loaned and advanced large sums of money to the party of the second part, and made, constructed and equipped one hundred and five miles of the railroad of the said party of the second part in the State of Minnesota, and the said party of the second part is indebted to the said parties of the first part in a large sum of money on account thereof:

And whereas, the said parties have agreed upon the terms of liquidation, settlement and payment of all such indebtedness, and the adjustment of the matters between them on the terms hereinafter stated:

And whereas, the said party of the second part hath heretofore issued and delivered to the said parties of the first part its first-mortgage bonds on said road for two millions one hundred thousand dollars, in part payment of such indebtedness:

Now the said party of the second part hath agreed, and doth hereby agree, in further part payment and satisfaction of such indebtedness, to issue to the said parties of the first part four hundred thousand dollars of the full-paid capital stock of its said company, and will also make, execute and deliver to the said parties of the first part twelve hundred and sixty bonds or obligations of the said party of the second part, which said twelve hundred and

28 sixty bonds shall bear date respectively on the first day of November, one thousand eight hundred and sixty-seven, and be for one thousand dollars each, payable in forty years from said date, and bear interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York; and that the said twelve hundred and sixty bonds, to be issued as aforesaid, shall be part of a series of eighteen hundred bonds of one thousand dollars each, all of which shall bear interest and be payable as aforesaid, and all of which shall be equally secured by a deed of trust or mortgage, to be executed by the said Winona & St. Peter Railroad Company to Samuel J. Tilden, as trustee, conveying the railroad of the said last-named company from Winona westwardly to the Minnesota river, a distance of one hundred and fifty miles, more or less, as such railroad has been or shall hereafter be constructed, together with the equipments and appurtenances thereof, subject only to the prior lien of a certain other deed of trust or mortgage heretofore

executed by said Winona & St. Peter Railroad Company to H. N. Stockwell and Jesse Hoyt, trustees, to secure the payment of first-mortgage bonds of said last-named company, issued and to be issued to the aggregate amount of three millions of dollars. And it is hereby expressly provided, that the bonds herein agreed to be issued as aforesaid, shall be issued only at the rate of twelve thousand dollars per mile of the portion of the Winona & St. Peter railroad constructed at the time of issuing the same, the distance now constructed, and in respect to which the said twelve hundred and sixty bonds sold or agreed to be sold as aforesaid, shall be issued, being one hundred and five (105) miles. And it being understood and agreed that the remaining five hundred and forty bonds shall be issued only from time to time as the work of constructing said railroad shall progress, at such times and in such manner that the aggregate amount of bonds of the series of eighteen hundred bonds aforesaid, which shall be at any time outstanding, shall not exceed the proportion of twelve thousand dollars per mile of such series of bonds for each mile of the said Winona & St. Peter railroad which shall be at such time constructed.

And whereas, the said party of the second part is or claims to be entitled to have and receive, under the several acts of Congress passed in aid of the construction of the said railroad, a certain number of acres of land, supposed to be about six hundred thousand acres, for constructing the portion of said road now constructed, to wit: one hundred and five miles of railroad:

Now for the residue of the said indebtedness of the said party of the second part to the said parties of the first part, the said party of the second part hath agreed to sell and convey to the said parties of the first part, as many acres of land heretofore granted by Congress to the State of Minnesota, as the said party of the second part shall receive from the said State by reason of the construction of the portion of the Winona & St. Peter railroad heretofore constructed, to wit: one hundred and five miles thereof extending westwardly from Winona, excepting and reserving, nevertheless, any and all parts and parcels of such lands (if any such there be) which may be necessary for the track of said railroad, or the right of way, or any depot or depot grounds thereof, or any other purpose incidental to the operation of the said railroad constructed, or to be constructed, or any part thereof; which said lands hereinbefore agreed to be sold shall be conveyed to the said parties of the first part, or as they shall in writing direct, whenever and as soon as the said party of the second part shall obtain the title thereto under such acts of Congress. The lands to be conveyed as aforesaid shall be selected as follows:

Beginning at Winona aforesaid, and from thence proceeding on each side of the said railroad on a course running parallel therewith, and embracing each of the six, ten, fifteen and twenty mile limits of the congressional land grants, and in proceeding taking all lands within each and all of said limits which shall be received by the said company, under said acts of Congress, or either of them;

it being understood, that on each side of said railroad a*n* uniform line of advance westwardly, embracing all the lands in said limits shall be maintained as nearly as may be, until as many acres shall have been selected and taken as the said company shall have received for the construction of the portion of said railroad now completed, which is estimated to be one hundred and five miles thereof, extending northerly and westerly from Winona aforesaid; it being understood that the said parties of the first part shall receive as many acres as shall be received by the party of the second part for the construction of said one hundred and five miles, or so much thereof as is now constructed, notwithstanding that under the acts of Congress the said lands are certified only upon the completion of sections of not less than ten miles of railroad, but reserving, excepting and deducting from the said number of acres all lands necessary for the track of said railroad, or the right of way, or depots or depot grounds, or other purposes incidental to the operation of said railroad.

31 And the said party of the second part agrees to acquire the title of said lands as fast as it may be permitted to do under said acts of Congress, and to release and convey to the said parties of the first part, or to such person or persons in such manner, and from time to time, as may be devised by the said parties of the first part, or their counsel, on the request of the said parties of the first part, or a majority of them, and will do any and every other act and thing necessary and proper to secure the said parties of the first part said lands and every part and parcel thereof, and the proceeds thereof, if it shall be hereafter determined that the same shall be sold by the said party of the second part, for the benefit of the said parties of the first part; and until the final arrangements shall be made in reference thereto, the title shall be held by the said party of the second part; and as some time is necessary to enable said parties of the first part to confer and agree upon the details in relation to the holding of the title and the mode of disposing of said lands, this clause is inserted to express the agreement of said parties in relation thereto.

And it is further agreed by and between the parties hereto, that the said parties of the first part shall have and take all the cash assets of the said party of the second part, up to the first day of November, 1867, and that the said parties of the first part shall assume and agree to pay, and that they shall fully pay and discharge all the floating debts of the said party of the second part up to the said first day of November, 1867, and all liabilities thereof to that date, except bonded debt, and including the interest to the said first day of November, 1867, which shall have accrued upon the outstanding bonds of the party of the second part, and which will amount at said date to the sum of forty-nine thousand dollars.

32 And the said parties of the first part hereby covenant, promise and agree, to and with the said party of the second part, that the said parties of the first part shall and will receive and accept the property and things hereinbefore agreed to be transferred to them in full payment, satisfaction and discharge of all indebted-

ness of the said party of the second part to the said parties of the first part, or either of them.

And it is hereby further declared and agreed, that it shall be optional with the said party of the second part whether or not the said party of the second part shall construct the said railroad to any point beyond that to which it is now completed; but if the said party of the second part shall not, on or before the first day of February, 1869, resolve to undertake the construction of said railroad to the first crossing of the Minnesota river, at or near Mankato, a distance of about twenty-four miles, and notify the said parties of the first part, or some of them, that it will undertake such construction, the said parties of the first part shall then, to wit: from and after the said first day of February, 1869, become entitled and be suffered and permitted, at their own election, to undertake the construction of said road to the said first crossing at or near Mankato aforesaid, and to complete the same within fifteen months from the said first day of February, 1869, at the proper cost and expense of the parties of the first part, but for the use and benefit of the party of the second part, upon the terms following, that is to say: the said party of the second part electing not to construct said railroad to the said first crossing, at or near Mankato aforesaid, and the said parties of the first part, within fifteen months from the said first day of February, 1869, undertaking such construction as aforesaid, the said party of the second
33 part shall issue and deliver to the said parties of the first part, from time to time, as the work of construction shall progress, the first-mortgage bonds aforesaid, at the rate of twenty thousand dollars in amount thereof, and the sinking-fund bonds aforesaid at the rate of twelve thousand dollars in amount thereof, for each mile of the said railroad which shall be constructed by the said parties of the first part as aforesaid, in addition to the one hundred and five miles now completed, until the said railroad shall be completed to the first crossing aforesaid; and upon the completion thereof by the party of the first part to the first crossing aforesaid, provided the same shall be so completed by the first day of May, one thousand eight hundred and seventy, said parties of the first part shall become entitled to receive from the party of the second part the same number of acres of land which the said party of the second part shall receive under the said acts of Congress for the construction of said railroad from the point to which it is now completed to the said first crossing, except such lands as shall be required for railroad purposes, as hereinbefore provided in regard to the one hundred and five miles now constructed; which lands to be conveyed as aforesaid to the parties of the first part, upon the completion of said road by them to the said first crossing, shall be selected in the same manner as hereinbefore provided in respect to the lands hereinbefore agreed to be conveyed to the parties of the first part, or for their benefit, for the construction of said one hundred and five miles; and all the provisions hereof, in respect to the lands which may be received for the construction of

the said one hundred and five miles, shall apply to the lands
34 which may be received for the construction of said additional twenty-four miles: Provided, always, that the said parties of the first part, undertaking the construction of said twenty-four miles, shall construct, complete and equip the same in such a manner that the condition thereof, upon the average, shall be in all respects equal, including equipment, to the average condition of the one hundred and five miles heretofore constructed, with the exception only that the said parties of the first part shall not be obliged to erect elevators thereon.

And provided further, that the said parties of the first part, undertaking the construction of said railroad beyond the point to which it is now completed, and receiving therefor the bonds aforesaid, shall indemnify and save harmless the party of the second part from all costs, charges, expenses, damages and liabilities of such construction.

And it is hereby further declared and agreed, that either party hereto, undertaking the construction of said railroad to the first crossing aforesaid, shall complete the same by the first day of May, one thousand eight hundred and seventy.

And it is hereby further declared and agreed, that if the said parties of the first shall build the said extension of the said railroad to the said first crossing as aforesaid, pursuant to this agreement, the said party of the second part shall allow them to use the tracks of the constructed portions of said railroad to transport, free of charge and by the proper motive power, locomotives, cars, and other rolling stock, and the proper agents, employees and servants of the parties of the first part, and at their expense, all materials used in such construction, and all workmen employed in
35 making the same, under and subject to such reasonable rules and regulations in respect to running trains over the said railroad, or any part thereof, as shall be from time to time prescribed by the said party of the second part, or the proper officer or officers thereof. And provided further, that such use of said track shall not impede or interfere with the ordinary business of said railroad; and that the said parties of the first part shall indemnify and save harmless the party of the second part from and against all loss and damage from any cause arising out of the use of said track by the said parties of the first part as aforesaid.

And it is hereby further declared and agreed, that after the completion of the said railroad to the first crossing aforesaid, it shall be optional with the party of the second part whether it shall construct the said railroad from the said first crossing to the second crossing of the Minnesota river, being about twenty-eight miles, more or less, (including the bridge over the first crossing); but if the said party of the second part, shall not within the period of one year from the completion of said railroad to the first crossing, resolve to undertake the further construction of said road to the second crossing aforesaid, then, to wit: after the expiration of the period of one year from the time of the completion of said road to the said first crossing, the said parties of the first part shall become entitled, and

shall for the further period of one year, possess the option, to undertake to construct the said railroad from the said first crossing to the said second crossing, at the proper cost and expense of the parties of the first part, but for the use and benefit of the party of the second part, upon the terms following, that is to say: the said
36 party of the second part electing not to construct said railroad to the said second crossing, the said parties of the first part, thereupon, within one year from the time of being notified of such election, undertaking the construction thereof, the said party of the second part shall issue and deliver to the said parties of the first part, from time to time, as the work of construction shall progress, the same amount of bonds per mile as hereinbefore provided in respect to the construction of said road to the said first crossing; and all the provisions, conditions and agreements herein contained in respect to the construction of the said road to the said first crossing, so far as the same are applicable, excepting hereinafter otherwise provided, shall apply equally to the construction thereof to the second crossing; and if the said railroad shall be constructed from the first to the second crossing by the parties of the first part as aforesaid, and completed within the period hereinafter mentioned, the said parties of the first part shall thereupon become entitled to receive, from the party of the second part, the same number of acres of land which the said party of the second part shall receive under said acts of Congress for the construction of said road from the said first to the said second crossing; and all the provisions hereof in respect to the lands to be received for the construction of said one hundred and five miles, shall apply to the lands to be received for the construction of said railroad from the first to the second crossing.

And it is hereby further declared and agreed, that either party undertaking the construction of said road from the first to the second crossing, shall complete the same within three years from the time of the completion of the said road to the said first crossing.

37 And it is further understood and agreed that if the said parties of the first part shall undertake the construction aforesaid, they shall, if the party of the second part shall so elect, construct the said railroad to a point on the northerly side of the Minnesota river which the said party of the second part shall designate, and which shall not be more than twenty-eight miles distant from the said first crossing, with the same effect, so far as the provisions of this agreement are concerned, as if such party constructed the same to the said second crossing; provided such construction to said point be made within the same time and in the same manner as hereinbefore provided in respect to the construction to the said second crossing.

And the said party of the second part further agrees, in consideration aforesaid, that it will not, at any time hereafter, encumber by mortgage or otherwise the said lands hereinbefore described, and which, by the terms of this agreement, are to be conveyed to the parties of the first part, or as they shall direct.

And the said parties of the first part further agree that all the expenses of procuring title to such lands, and the expenses of any and all conveyances which shall be made of said lands shall be paid by the parties of the first part.

In witness whereof the said parties of the first part have hereunto set their hands and seals, and the said party of the second part has caused its corporate seal to be hereunto annexed, and the same to be attested by the signatures of its president and treasurer, the day and year first above written.

(Signed) D. N. BARNEY. [SEAL.]
WM. G. FARGO. [SEAL.]
38 ANGUS SMITH. [SEAL.]
ALFRED M. HOYT. [SEAL.]
SAMUEL N. HOYT, [SEAL.]
By A. M. HOYT, *Att'y.*
BENJ. P. CHENEY, [SEAL.]
By A. H. BARNEY, *Att'y.*
C. F. LATHAM, [SEAL.]
By D. N. BARNEY, *Att'y.*
JESSE HOYT. [SEAL.]
{ W. & ST. P. R. R. CO. SEAL. } WINONA & ST. PETER RAILROAD COMPANY,
By GEO. L. DUNLAP, *President.*

Sealed and delivered in the presence of—
CHARLES NETTLETON.

STATE OF NEW YORK, *City and County of New York,* } ss:

Be it remembered that on the eighteenth day of December, A. D. one thousand eight hundred and sixty-seven, before me, the undersigned, Charles Nettleton, a commissioner resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the State of Minnesota, to take the acknowledgment of deeds, etc., to be used or recorded therein, personally appeared Danford N. Barney, William G. Fargo, Angus Smith, Alfred M. Hoyt and Ashbel H. Barney, personally to me known to be five of the same persons described in and who executed the foregoing instrument of writing, and severally acknowledged to me that they had executed the same as their and each of their free and voluntary act and deed in their own behalf, and for the uses and purposes therein mentioned; and on the same day also before me again personally appeared the said
39 Alfred M. Hoyt, personally known to me to be the attorney-in-fact of Samuel N. Hoyt, one of the persons described in and who executed the foregoing instrument of writing by said attorney, and the said Alfred M. Hoyt acknowledged to me that he had, as such attorney, executed the same instrument as the free and voluntary act and deed of the said Samuel N. Hoyt, and for the uses and purposes therein mentioned; and on the same day also before me again

personally appeared the said Ashbel H. Barney, personally known to me to be the attorney-in-fact of Benjamin P. Cheney, one of the persons described in and who executed the foregoing instrument of writing, by his said attorney, and the said Ashbel H. Barney acknowledged to me that he had, as such attorney, executed the same instrument as the free and voluntary act and deed of the said Benjamin P. Cheney, and for the uses and purposes therein mentioned; and on the same day also before me again personally appeared the said Danford N. Barney, personally known to me to be the attorney-in-fact of Charles F. Latham, one of the persons described in and who executed the foregoing instrument *in* writing by his said attorney, and the said Danford N. Barney acknowledged to me that he had, as such attorney, executed the same instrument as the free and voluntary act and deed of the said Charles F. Latham, and for the uses and purposes therein mentioned.

And on the same day also before me personally appeared George L. Dunlap, to me personally known to be the president of the Winona and St. Peter Railroad Company, described in and who executed the foregoing instrument of writing by said George L. Dunlap, as president, and the said George L. Dunlap, being by me duly sworn according to law, did depose and say, that he resided in the city of Chicago, county of Cook, State of Illinois; that he was president of the said Winona and St. Peter Railroad Company; that he knew the corporate seal of the said company; that the seal affixed to the foregoing instrument, purporting to be the seal of said company, was such corporate seal; that it was so affixed by order of the board of directors of said railroad company, and that he signed his name thereto by the like order as president of said company; and he also acknowledged to me that he had executed the said instrument as the free and voluntary act and deed of the said Winona and St. Peter Railroad Company, for the uses and purposes therein mentioned.

And on this sixth day of January, A. D. one thousand eight hundred and sixty-eight, also before me personally appeared Jesse Hoyt, personally to me known to be one of the same persons described in and who executed the foregoing instrument of writing, and he acknowledged to me that he had executed the same as his free and voluntary act and deed, and for the uses and purposes therein mentioned.

[SEAL.] In witness whereof, I have hereunto set my hand and affixed my official seal, this 6th day of January, A. D. 1868.

(Signed) CHARLES NETTLETON,
Commissioner for Minnesota in New York.

EXHIBIT "A."

State of Minnesota, Brown County, District Court, Ninth Judicial District.

41 STATE OF MINNESOTA
vs.
CERTAIN LANDS SITUATED IN SAID BROWN COUNTY TO ENFORCE the Payment of Taxes and Penalties Remaining Delinquent Thereon on the First Monday in January, 1888.

In the matter of the proceedings in said court for the enforcement of the payment of taxes and penalties remaining delinquent upon lands in said county on the first Monday in January, 1888.

The Winona and St. Peter Land Company, a corporation created and organized under the laws of the State of Minnesota, makes answer in respect to that portion of said lands owned by it and which are hereinafter particularly described, and states its objections to the enforcement of said alleged delinquent taxes and penalties and every part thereof against the said lands owned by said land company.

The said Winona and St. Peter Land Company owns the following-described lands situated in said county (here follows the description of the lands).

The answer further alleges that said lands above described were acquired by the Winona and St. Peter Railroad Company, a corporation created and organized under the laws of the late Territory and present State of Minnesota with authority to construct that line of railroad known as "the Winona and St. Peter road," and were so acquired by said railroad company to aid in the construction of said line of railroad under the act of Congress entitled, "An act making a grant of lands to the Territory of Minnesota in alternate sections to aid in the construction of certain railroads in said
42 Territory, and granting public lands in alternate sections to the State of Alabama to aid in the construction of a certain railroad in said State," approved March 3, 1857, and acts amendatory thereof, and certain acts of the late Territory and present State of Minnesota passed in the execution of a trust created by said act of Congress. That said lands were so acquired by said railroad company prior to the years for which taxes are now claimed against the same respectively. That under the laws of said State, relating to the property of said railroad company, said lands were exempt from taxation during the time the same should be held and owned by said railroad company; and the answer alleges that said railroad company continued to hold the legal title to said lands and claimed the same as its own until some time in the year 1887, when said lands were conveyed by said railroad company to this defendant, the said Winona and St. Peter Land Company; and the answer therefore claims that said lands were not nor was any tract thereof subject to taxation while so held and claimed by said railroad company.

II.

It appears from the delinquent list filed with the clerk of the said court and published, that delinquent taxes and penalties are sought to be enforced against some of the said lands which accrued, if at all, more than six years before the commencement of these proceedings; and the answer makes the point and insists that all taxes, delinquent taxes and penalties, and rights of taxation which accrued more than six years before the commencement of proceedings to enforce the same, are barred by the statute of
43 limitations and cannot be enforced in these proceedings or otherwise against the lands.

Sec. 12, chap. 66, Gen. Statutes.

San Francisco *vs.* Jones, 20 Fed. Rep., 188.

III

If any taxes are claimed against west half (W. ½) of northeast quarter (N. E. ¼), west half (W. ½) of southeast quarter (S. E. ¼) and southwest quarter (S. W. ¼), section twenty-seven (27), township one hundred and nine (109); and southeast quarter (S. E. ¼) section thirty-one (31), township one hundred and nine (109), all in range thirty-five (35), for any year, the same cannot be enforced in these proceedings in any event, because said lands are not described or embraced in the published delinquent list. If intended to be described in said published list, they are described as being in range thirty-two instead of range thirty-five.

It is also further claimed by the answer that no taxes can be enforced against said lands of the said Winona and St. Peter Land Company for the year 1866, for the reason that in the published list or advertisement no taxes are claimed for the year 1866.

IV.

For a 4th and further objection to the enforcement of said alleged delinquent taxes against said lands, the answer of the said Winona and St. Peter Land Company, alleges on information and belief that said lands were not nor was any tract thereof ever assessed for taxes in the mode and manner required by law for the assessment
44 of taxes against real estate, for any year or years for which taxes are now claimed against the same; nor were said lands or any of the same entered upon the tax-list or duplicate for said years or any year as required by law in such cases.

J. M. GILMAN,
Attorney for said Land Company.

Exhibit "E."

Final Decree of the U. S. Circuit Court.

United States Circuit Court, District of Minnesota.

Ashbel H. Barney *et al.*
vs.
The Winona & St. Peter R. R. Co.

The original decree in this action, entered at the December term of this court, 1880, to wit, on the 13th day of April, 1881, having been modified on appeal to the Supreme Court of the United States, and this court having undertaken to execute the mandate of the said Supreme Court by a decree modifying said original decree, entered at the June term of said court, 1885, to wit, on the 6th day of October, 1885, and the complainants having appealed from said modified decree to the Supreme Court of the United States, by which said last-named modified decree was reversed, and the mandate of said Supreme Court having been filed in the office of the clerk of this court, whereby fifteen thousand acres and forty-five hundredths of an acre in addition to the lands used for the track of the Winona & St. Peter Railroad Company for depots and other purposes
45 necessary and incident to its operation are ordered to be deducted from the number of acres to a conveyance of which from the defendants, The Winona & St. Peter Railroad Company, to the plaintiffs, or such persons as a majority of them may appoint by the aforesaid decree of this court, made at its December term, 1880, the plaintiffs were adjudged to be entitled, and a majority of the plaintiffs having requested that the conveyance of said lands be made to the Winona and St. Peter Land Company, a corporation organized under the laws of the State of Minnesota, and all the heirs-at-law and successors in interest of certain complainants herein deceased having been made parties to this suit:

Now, therefore, it is ordered and decreed that the defendant, The Winona & St. Peter Railroad Company, specifically perform the contract in suit, and do convey forthwith to the Winona & St. Peter Land Company, as a majority of the plaintiffs and a majority of the obligees in said contract have requested, in addition to the lands already conveyed, the lands in the said original decree, made at the December term, 1880, and the list and descriptions subjoined thereto, specifically described, being one hundred and ninety-seven thousand one hundred and eleven acres and sixty and one-half hundredths of an acre, less and except fifteen thousand acres and forty-five hundredths of an acre, to wit: that the said defendants do convey to the said Winona & St. Peter Land Company the lands, a correct description of which, by sections, townships and ranges is contained in the subjoined list and description marked "Schedule A," but excepting from said conveyance all lands used for the track
46 of said railroad, to wit: a strip of land across each of said lands crossed by said railroad fifty feet in width on each side

of the center line of the main track of the Winona & St. Peter railroad, as the same is now located and constructed, and any greater width, not exceeding one hundred feet in width, upon each side of said center line, where necessary permanently to include all cuts, embankments and ditches and other works of said company necessary to secure and protect its main line of railroad, and all depot grounds at the several stations, and lands used for other purposes necessary and incident to the operation of said railroad, the same to be described by metes and bounds or other suitable description, and included in the exception to the grant of any section in which any of said lands are situated. And it is further ordered and decreed that the complainants do recover of the defendant their costs and disbursements, to be taxed by the clerk.

R. R. NELSON, *Judge.*

St. Paul, March 7, 1887.

(Here follows Exhibit "A," giving a description of the lands, including the lands described in the petition and involved in these proceedings.)

47 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1888.

THE STATE OF MINNESOTA, Respondent,
vs.
THE WINONA & ST. PETER LAND COMPANY, Appellant. } 5655. Syllabus.

Gen. St. 1878, ch. 11, sec. 113, as amended by Laws 1881, ch. 5, sec. 1, providing for assessing taxes upon property for past years in which such taxes had not been assessed, does not authorize the including in such assessment of penalties for such years.

48 STATE OF MINNESOTA:

Supreme Court, October Term, A. D. 1888.

THE STATE OF MINNESOTA, Respondent,
vs.
THE WINONA & ST. PETER LAND COMPANY, Appellant. } 5655. Opinion.

The point made by the defendant, that the lands involved were exempt from taxation, was decided adversely to the defendant in State *vs.* Winona & St. Peter R. Co., 21 Minn., 472, and County of Brown *v.* Winona & St. Peter Land Co., 38 Minn., 397, which decisions we adhere to. Following the decision in the latter case, we hold that the statute of limitations is no bar to the right of the State to assess the taxes on lands for years in which they were omitted from the assessment.

The statute (Gen. St. 1878, ch. 11, sec. 113) as amended by Laws

1881, ch. 5, sec. 1, provides that "if any real or personal property shall be omitted in the assessments of any year or years, and the property shall thereby escape taxation, when such omission shall be disovered the county auditor shall enter such property on the assessment and tax books for the year or years omitted, and shall assess the same, and extend all arrearages of taxes properly accruing against said property, with seven per cent. interest thereon from the time said taxes would have become delinquent, and the same shall be extended against such property on the tax-list for the
49 current year." From the certificate of the findings of fact by the court below it appears that the amount of taxes inserted in the list was made by assessing taxes, interest, and penalties for each year in which the assessment had been omitted. The defendant complains only of the penalties thus added to the taxes each year. Without inquiring whether the legislature could impose a penalty for non-payment of a tax while one has no opportunity to pay it, it is enough to say it has not assumed to do so. There is no warrant in the statute we have quoted for including penalties in the amount assessed. The answer may be insufficient to entitle the defendant on the trial below to prove that such penalties were included if the evidence had been objected to, but the fact is found, and we must presume it was so found on evidence admitted without objection. The court below will ascertain how much penalties were so included in the assessment and exclude the amount of them from the amount of the judgment.

GILFILLAN, *C. J.*

Endorsed: 5655. State of Minnesota supreme court. The State of Minnesota, respondent, *vs.* The Winona & St. Peter Land Company, appellant. Opinion and syllabus. Filed November 12th, 1888. J. D. Jones, clerk. October term, A. D. 1888. Gilfillan, C. J.

50 STATE OF MINNESOTA:

Supreme Court, April Term, 1889.

THE STATE OF MINNESOTA, Respondent,
vs.
THE WINONA AND ST. PETER LAND COMPANY, Appellant.

On reading and filing the affidavit of J. A. Tawney, hereto attached, and upon all the papers and records in said case on file in the office of the clerk of this court, it is ordered that the respondent show cause before this court, at the supreme court room, in the capitol building, at the city of St. Paul, in said State, on the 20th day of June, 1889, at the hour of ten o'clock a. m. on said day, or as soon thereafter as counsel can be heard, why the decision or direction of this court to the district court in and for the county of Brown and State aforesaid should not be corrected and modified so as to exclude and eliminate therefrom all taxes barred by section-six and twelve, title two, chapter 66, Compiled Statutes, 1878, as

said statute is construed and applied by this court in the case of The State *vs.* The Winona and St. Peter Land Company, decided at the present term of this court, and also all interest and penalties claimed in said action.

Ordered further that a copy of this order and affidavit attached be served forthwith upon the Hon. M. E. Clapp, attorney general, St. Paul, and George W. Somerville, county attorney for Brown county, Sleepy Eye, Minn.

51 Dated St. Paul, June 15th, 1889.

WM. MITCHELL,
Ass. Justice Sup. Court.

STATE OF MINNESOTA:

Supreme Court, April Term, 1889.

THE STATE OF MINNESOTA, Respondent,
vs.
THE WINONA AND ST. PETER LAND COMPANY, Appellant.

STATE OF MINNESOTA, }
County of Winona, } *ss:*

J. A. Tawney came before me personally and, being first duly sworn, doth depose and say that he is one of the attorneys of the appellant above named; that said cause was certified to the supreme court of this State by the presiding judge of the district court in and for the county of Brown, in said State, and was submitted and decided at the October, 1888, term of said court; which decision was filed November 12th, 1888.

Further deposing, affiant says that no order of judgment in said action has been made or entered in the above-named court upon said decision; that said cause has not in any way been remitted to the district court from whence it was certified as aforesaid, and that the same is now properly in this court.

That said cause was not orally argued, but was submitted on briefs; that among other things it was claimed therein by
52 counsel for appellant that the court erred in holding that the statute of limitations was not operative to bar the right to enforce the payment of taxes after the lapse of six years from the date the right so to do accrued, and that the court erred in allowing judgment for the penalties and interest as claimed in the delinquent list or any penalty whatever.

That the decision of said cause by this court, filed as hereinbefore stated, and notwithstanding the errors assigned by appellant as aforesaid, affirmed the decision of said district court as to everything claimed by the State in said proceeding, except the penalties included therein, which had been added to the tax for each year, and as to them the said district court was directed to ascertain the amount thereof included in the assessment and exclude the same from the amount of the judgment.

Further, affiant deposeth and saith that at the present term of said court, and since said cause was submitted and decided as afore-

said, and after the most careful consideration, the above-named court decided in the case of the State against this appellant, involving taxes for past years on the lands of said appellant situated in the county of Redwood, that the statute of limitations is a bar to the right to enforce the payment of taxes after the lapse of six years from the date the right to institute proceedings for that purpose accrued, and that where taxes are assessed under chapter 5, General Laws, 1881, and proceedings are instituted to enforce their payment,
53 that neither interest nor penalties can be included, or, in other words, that nothing except the bare taxes for six years prior to the date of the commencement of the action to obtain judgment for the taxes so assessed can be included in the judgment.

That the case above entitled and the one last above referred to are identically the same, substantially between the same parties, and that no rights of third parties have since the decision of the above-entitled cause intervened to be prejudiced or in any way affected.

Now, therefore, that full and complete justice may be done between the parties, uniformity established in the enforcement of taxes levied under and in pursuance of chapter 5, General Laws, 1881, and that the rights of the respective parties to the above-entitled action may be definitely and finally determined upon a uniform principle and rule of law, affiant prays that an order be granted requiring the respondent above named to show cause before this court why the said decision or direction of the supreme court to the district court aforesaid should not be modified in accordance with the rules laid down and established in the decision of the Redwood County case above referred to, and that a stay of all further proceedings in the above-entitled action be granted until the hearing upon said motion.

J. A. TAWNEY.

Subscribed and sworn to before me this 14th day of June, 1889.

WECK J. SMITH,
[SEAL.] *Notary Public, Winona Co., Minn.*

Endorsed: 5655. State of Minnesota supreme court, April term. The State of Minnesota, plaintiff, against The Winona and St. Peter Land Company, defendant. Order to show cause. Filed July 9th, 1889. J. D. Jones, clerk. J. M. Gilman and Tawney & Randall, attorneys for appellant, Winona, Minn.

54 69th day.

STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1889.

TUESDAY MORNING, *July 16th*, 1889—9.30 o'clock.

Court convened pursuant to adjournment, all the justices being present.

THE STATE OF MINNESOTA, Respondent,
vs.
THE WINONA & ST. PETER LAND CO., Appellant. } 5655.

This cause came on to be heard this day upon an order to show cause why the decision of the court heretofore made should not be modified, and, after hearing counsel thereon and upon due consideration thereof, it is ordered that the direction in the opinion heretofore filed in this cause be modified so as to direct the court below to exclude also from its judgment the amount of taxes and interest thereon included in it for years prior to the year 1880, except as to such of the lands involved as since the filing of said opinion were at tax sale sold to actual cash purchasers or since said sale and heretofore were assigned to third persons.

A true record.

Attest: J. D. JONES, *Clerk.*

55 STATE OF MINNESOTA:

Supreme Court, April Term.

THE STATE OF MINNESOTA
vs.
THE WINONA AND ST. PETER LAND COMPANY.

This cause having been duly certified to this court by Honorable B. F. Webber, the presiding judge of the district court in and for the county of Brown, ninth judicial district, State aforesaid, and decided at the October, 1888, term thereof, and this court, in the opinion filed in said cause, having directed therein that the court below ascertain the amount of penalties included in said judgment and exclude the same therefrom, and no remittitur or order of any kind having been made or filed in said cause transmitting the same back to the said district court, and said cause being now in this court, The Winona & St. Peter Land Company, the appellant above named, having applied to this court for a modification of its decision and direction in said cause so as to exclude from the judgment entered therein all taxes barred by the statute of limitation and interest thereon, and after hearing the respective parties in said application, this court, on the 16th day of July, 1889, duly made and filed its order therein directing a modification of its former decision and direction in said cause so as to exclude also from the judgment entered therein in the court below all taxes included therein
56 for years prior to 1880 and interest, except as to such of the lands involved as since the filing of said opinion were at tax sale sold to actual cash purchasers or since said sale and heretofore were assigned to third persons:

Now, therefore, pursuant to the statute in such case made and provided, it is hereby ordered and the said district court in and for the said county of Brown is hereby directed to ascertain the amount of penalties included in said judgment on the taxes and interest, and also the amount of taxes included in said judgment for years

prior to 1880, and the amount of interest on said taxes, and exclude the same therefrom, except as to such of the lands involved in said proceeding as since the filing of said opinion were at tax sale sold to actual purchasers or since said sale and heretofore were assigned to third persons.

Dated July 19th, 1889.

[SEAL.]

J. D. JONES,
Clerk of Supreme Court.

Endorsed: 5655. State of Minnesota *vs.* Winona & St. Peter Land Company. Final order. Filed July 19, 1889. Entered, Book F, page 8.

57 STATE OF MINNESOTA:

Office of the clerk of the Supreme Court.

Answer of the Judges of the Supreme Court of the State of Minnesota in the within Writ Mentioned.

To the Supreme Court of the United States:

The judges of the supreme court of the State of Minnesota, by the clerk of that court, hereby certify and return to the annexed writ of error—

That the annexed copy of record contains, comprises, and constitutes a true and complete transcript of the final judgment, judgment-roll, record, and proceedings had in the supreme court of the State of Minnesota in the case between The State of Minnesota, defendant in error, and The Winona & St. Peter Land Company, plaintiff in error, including also copy of the petition for said writ of error and of the bond given in that behalf, and the original citation and proof of service thereof, as the same remain of record and on file in the office of the clerk thereof.

In testimony whereof the clerk of the supreme court of the State of Minnesota has hereunto subscribed his name and has caused the seal of that court to be hereunto duly affixed, at his office, at the capitol, at St. Paul, in the State of Minnesota, on the 14th day of July, A. D. 1891.

[Seal of the Supreme Court, State of Minnesota.]

C. P. HOLCOMB,
Clerk of the Supreme Court of Minnesota.

58 [Endorsed:] State of Minnesota, supreme court. The State of Minnesota, respondent, *vs.* The Winona & St. Peter Land Co., appellant. Return to Supreme Court of the United States. C. P. Holcomb, clerk of supreme court of Minnesota.

Endorsed on cover: Case No. 14,752. Minnesota supreme court. No. 236. The Winona and St. Peter Land Company, plaintiff in error, *vs.* The State of Minnesota. Filed July 18th, 1891.

31 and 38

SUPREME COURT.

United States of America.

October

APRIL TERM, 1894.

No. 221

THE WINONA & AND ST. PETER LAND COMPANY,

Plaintiff in Error,

VS.

THE STATE MINNESOTA,

In Error to the Supreme Court of the State of Minnesota.

Brief in Behalf of Plaintiff in Error

JAMES A. TAWNEY,
Solicitor for Plaintiff in Error,
Winona, Minn.

SUPREME COURT.

United States of America.

October
~~APRIL~~ TERM, 1894.

THE WINONA & AND ST. PETER LAND COMPANY,

Plaintiff in Error,

VS.

THE STATE MINNESOTA,

Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

STATEMENT.

The controversy between the parties to this action grows out of the attempt on the part of the State of Minnesota to enforce the collection of certain

taxes, interest and penalties against lands in the County of Redwood, in said State, owned by the defendant in error. The lands in question are part of the lands granted by act of Congress, approved March 4th, 1857, to the Territory, now State, of Minnesota, to aid in the building of certain railroads in that State. By an act of the Territorial Legislature, approved May 22nd, 1857, entitled, "An Act to Execute the Trust Created by Act of Congress," etc., these lands were granted to the Transit Railroad Company, and their conveyance duly authorized.

Section 4 of the Act just referred to exempts the lands, thus granted, from taxation, as follows:

"The said lands so granted shall be, and are, exempt from all taxation until the same shall have been sold and *conveyed* by said Company. In consideration of the grant of lands and other franchises and privileges hereby confirmed in and conferred on the Transit Railroad Company, the said Company shall pay into the treasury of the Territory or State of Minnesota, three per cent. upon all the gross earnings of said road, the amount of the gross earnings to be ascertained by the verified statement of the President and Treasurer of said company, as hereinbefore provided for; and the said three per cent. shall be so paid into the treasury of the Territory or future State of Minnesota, within sixty days after any portion of the said road shall be operated, and annually thereafter;

and the same, when paid, shall be in lieu of all taxes whatever."

The Transit Railroad Company failed to comply with the conditions of this act, and the lands, together with all the franchises, rights and privileges, reverted to the State. Thereafter, by an act of the Legislature of the State of Minnesota, approved March 10th, 1862, the Winona & St. Peter Railroad Company succeeded to "all the rights, benefits, property and franchises theretofore confirmed in and conferred on the Transit Railroad Company, including the exemption of its lands from taxation. This act was duly accepted by the Winona & St. Peter Railroad Company. The railroad was built by it, and the lands, from time to time, were certified to the State and, by the State, deeded to the railroad company. Some of the lands, the taxes of which are involved in this controversy, were conveyed by the State to the railroad company in 1869; others in 1870 and 1871. From the time of their conveyance to the railroad company until 1886, the lands were not assessed for taxes and during all that time there was no attempt to tax them. October 31st, 1867, the railroad company entered into a contract with D. N. Barney and others (Exhibit W, Record, P. 28.) No particular lands were specified or described in this

contract. The plaintiff in error, having succeeded to the rights of Barney and his associates under the contract of October 31st, 1867, sought to obtain from the railroad company the lands on which the taxes in question were levied, but the railroad company refused to convey, claiming the plaintiff in error was not entitled to the same under the Barney contract. After years of litigation, and pursuant to the final decree of the Circuit Court of the United States, made and entered, in accordance with the direction of this Court, and dated March 7th, 1887, the railroad company conveyed these and other lands to the plaintiff in error. Until then the lands were claimed by, and the fee thereto remained in, the possession and under the absolute control of the railroad company.

Until 1886, these lands were treated by the officers of Redwood County, in which County they were situated, as the lands of the railroad company and exempt from taxation. In that year they were assessed by the county auditor of Redwood County for the taxes for each year subsequent to the date when they were conveyed from the State to the railroad company, going back in some instances, eighteen years. This assessment was made without notice, and an opportunity to be heard. To the taxes, so

assessed and levied by the auditor of the County, there was added interest at the rate of seven per cent. and a penalty of fifteen per cent. for the non-payment of the taxes. The lands were assessed and the taxes levied under the provisions of Chapter 5 of the Laws of 1881, which reads as follows:

"If any real or personal property shall be omitted in the assessment of any year, or years, and the property shall thereby escape taxation, when such omission shall be discovered the county auditor shall enter such property on the assessment and tax books for the year, or years, omitted, and he shall assess the same and extend the arrearage of taxes properly accruing against said property with seven per cent. interest theron from the time said taxes would have become delinquent, and the same shall be extended against such property on the tax lists for the current year.

Payment of these taxes, interest and penalty was refused. Proceedings were thereupon instituted in the District Court of the State against the land to enforce their collection. Upon the trial of the case, judgment was ordered for the amount of the taxes assessed by the auditor with interest at seven per cent. and penalty, and an additional penalty of fifteen per cent. See Record, P. 12.

Upon the application of the plaintiff in error, the proceedings in the District Court were certified to the Supreme Court of the State, where the lands were held to be taxable and the judgment of the District Court affirmed in all respects, except as to interest and penalties and the taxes accruing more than six years before the commencement of the action. (See opinion of Court, Record, P. 3.) The aggregate amount of the taxes, for which judgment was ordered against the lands for the six years immediately preceeding their assessment, was $41,518.26. (See Record, P. 39, Folio 74.) From this judgment the plaintiff in error, by writ of error, appeals to this Court.

ASSIGNMENTS OF ERROR.

I.

That the assessment and taxation of the lands involved in said action is in conflict with section ten (10) of article one of the Constitution of the United States in this: that it violates and impairs the obligation of the contract existing between the State and the Winona & St. Peter Railway Company in respect to the taxation

of the land of that company before the same were sold and conveyed.

II.

That the act of legislature of the State of Minnesota, under and in pursuance of which said lands were assessed and said taxes were levied, is in conflict with the fifth amendment of the Constitution of the United States, in that it authorizes the assessment and taxation of the property of the citizen without notice to him, and affords no opportunity to the owner of property to appear and be heard in, or appeal from, the assessment proceedings thereby authorized.

(a) Under the act above referred to, the officers of the several counties of the said State of Minnesota are authorized, and, in certain cases, it is made their duty, to assess and tax the property of the citizen without giving notice and without an opportunity to be heard, and, if the tax is not paid, such officers are authorized to sell the property for the taxes so assessed for the past years; thus depriving the owner of his property without due process of law.

III.

That the county auditor of the county in which said lands are situated had no right to assess and tax the lands of the said company.

IV.

That the Supreme Court of the State of Minnesota erred in holding the lands of said land company to be taxable immediately upon their conveyance, by the State, to the railroad company, and that therefore the lands involved in this action are liable for all the taxes assessed and levied against the same for the six years next preceeding the commencement of this action to enforce said taxes.

V.

That said Supreme Court likewise erred in holding that the assessment and taxation of the property of the citizen under the act above referred to, and without notice or the right to appear or appeal, does not deprive the owner of his property without due process of law.

ARGUMENT.

From the record, as certified to this Court, it appears that the plaintiff in error did not obtain title to, nor possession nor control of, these lands until 1887. Were they taxable prior to that time? That the provisions of Section 4 of Chapter 2 of the Act of the Territorial Assembly of the Territory of Minnesota, granting these lands to the Transit Railroad Company, wherein it was provided that the lands so granted shall be and are exempt from all taxation until the same shall be sold and conveyed by said company, constituted a contract between the Territory of Minnesota and the Transit Railroad Company, and that said Winona & St. Peter Railroad Company succeeded to all the rights, property and franchises, of the Transit Railroad Company, acquired under said act, will not be disputed by the defendant in error.

State of Minnesota, vs. Winona & St. Peter Railroad Co., 21 Minn., 472.

It is claimed, however, that these lands were sold and conveyed within the meaning of Section 4 of the Act of May 22nd, 1857, prior to the year or years for which taxes are levied, and that, therefore, the taxa-

tion of the lands was not in violation of this contract.

It will likewise be conceeded that the only instrument relied on to establish the fact of this conveyance, is the contract of October 31st, 1867, between D. N. Barney and associates, parties of the first part, and the Winona & St. Peter Railroad Company, party of the second part. By the Supreme Court of the State it is held, that immediately upon the execution of this contract the lands were sold and the equitable title thereto became immediately vested in Barney and associates; and that the lands were no longer entitled to the exemption. Whether or not this is so, depends upon the construction of the several covenants of the respective parties to the contract, also whether or not the act of the Legislature of the Territory, exempting the lands until "sold or conveyed," contemplated any other conveyance than that which would be sufficient to pass the legal title from the railroad company to the purchaser.

DEPENDENT COVENANTS.

On the part of the plaintiff in error, it is claimed that the covenants of the contract are dependent; that

the agreement of the company to convey depended upon the prior performance by Barney and associates of their covenants, and that, in the absence of proof of such prior performance, it cannot be said from the contract alone that the equitable title passed to the parties of the first part.

So many decisions have been made on the vexed question of what are, and what are not, dependent covenants, and so many of them are irreconcilable that they perplex, rather than aid, the judgment in determining a given case. One rule, however is universal, and that is, the intention of the parties must control.

Grant vs. Johnson, 5 *N. Y.*, 247.

Philadelphia W. & D. R. Co., vs. Howard, 54 *U. S.* 339.

Pollock, vs. B. E. Co., 128 *U. S.*, 477.

Dependent covenants are those where the obligation assumed by one party depends upon the prior performance of the obligation by the other, in which case there could be no recovery without showing performance, or a willingness to perform.

Gardner vs. Carson, 15 *Mass.*, 503.

Babcock vs. Wilson 17 *Maine*, 372.

From the contract in question, it seems clear that the agreement on the part of the railroad company to convey these lands was to be performed in the future, and was to follow the payment, by Barney and associates, of the floating debts and all other liabilities of the railroad company, on November 1st, 1867, amounting at that time to the sum of $49,000, except the bonded indebtedness and interest thereon, (Ex. W Rec. p. 28) Barney and his associates also covenanted, and agreed, to accept the property and notes agreed to be conveyed by the company, and to discharge the railroad company from any and all liability on account of its indebtedness to them for the money advanced in the building of the road from Winona to Waseca. They further agreed to pay all the expense incident to procuring of the title to these lands from the General and State Governments, and to pay the expense of all conveyances. In view of these several provisions of the contract, together with the general purpose and subject matter thereof, it seems impossible to say that the consideration for the agreement of the railroad company to sell and convey the lands was divisible, and that the company could be compelled to convey without reference to whether or not Barney and associates performed their

part of the agreement. But such is the holding of the Court below on the facts stated.

When this question was first presented to the Supreme Court of the State, it was in the case of the State vs. The Winona & St. Peter Railroad Company, 21 Minn., 472. In deciding that case, the Court, by C. J. Gilfillan, held the consideration for the agreement of the company to convey the land to be divisible. It was also held, that after providing for payment of part of the indebtedness of the company to Barney and associates, the residue of the indebtedness was to be paid by the conveyance of the lands, and that the cash assets of the company turned over to Barney was the consideration for their agreement to pay the floating debts. The ground upon which this conclusion is based, as stated by the Court, was that the covenant of the company was to convey the lands as soon as it should obtain title thereto; an event, which, as stated by the Court, "Might happen before Barney and associates could be required to pay off the debts of the company." This is considered by the Court as decisive of the question of whether or not the covenants are dependent. It is true, it does not expressly appear that the floating debts and liabilities of the company were then due; nor does it

appear that the cash assets of the company, which the Court below says was the consideration for the agreement to pay that indebtedness, were equal to the indebtedness or adequate for that purpose. From the character of the indebtedness, however, which is described as "floating," it is very reasonable to assume that it was then due, or about to become due; so that the point, which the Court considered decisive of the question, rests upon the assumption that the cash assets of the company were equal to its floating debts and other liabilities, and that these debts and liabilities would not become due and payable until after the railroad company had acquired title to land which had not been and which, in the ordinary course of things, could not be certified to the state for several years thereafter. An analysis of the contract will show no foundation whatever for this assumption. It also ignores the rule that the intention of the parties must control in determining the question of whether, or not, covenants are dependent, and the rule, too, that in contracts of this description, the covenants of the respective parties are always considered dependent unless a contrary intent appears.

Shinn, et al, vs. Roberts, 43 Am. Dec., 636.

In the case last cited the Supreme Court of New Jersey says:

"In great relaxation of the technicalities, with which this branch of the law of contracts was formerly loaded and perplexed, it is not now the employment of any particular word, which determines a condition to be precedent, but the manifest intention of the parties. One of the rules upon which the construction depends, is, that where the mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other. * * * In agreements for purchase, indeed, it is now well settled, that the covenants are to be construed according to the intent of the parties, and are therefore always to be construed dependent unless a contrary intent appears."

In the case of the Bank of Columbia vs. Hagar, 1 Peters, 455, this Court by Thompson, J., said:

"In contracts of this description the undertaking of the respective parties is always considered dependent, unless a contrary intention clearly appears. * * * Although many nice distinctions are to be found in the books upon the question whether the covenants or promises of the respective parties to a contract are to be considered independent or dependent, yet it is evident the inclination of the Courts has strongly favored construction as being obviously the most just.

If, therefore, the agreement on the part of the railroad company to convey the land, depended upon the agreement of Barney and associates to pay the floating indebtedness and to discharge and release the railroad company from all liability on account of its indebtedness to them, and also to pay the expense of procuring title to the land and the expense of all the conveyances, and the State has not shown that these covenants were performed prior to the year for which the lands were assessed, then it cannot be said that from the contract, or from the record, it appears that the equitable title passed immediately upon the making of the Barney contract, or that the lands were deprived of their exemption from taxation by that instrument. This is not a suit to determine the rights of the parties to this contract, and there being no evidence as to when these dependent covenants on the part of Barney and others were, if ever, performed, the Court cannot assume that they were performed so as to admit of the passing of the title, either equitable or legal, immediately upon the making of that instrument.

It might be true that under certain conditions, if the covenants assumed by Barney and his associates were fully performed, the equitable title to these lands

would have then passed: but, in order to show when the lands became taxable by reason of this fact, it was incumbent upon the State, upon the trial of this action, to show such performance, and the date thereof, in order that the time when the lands became taxable might be known. Not having done so, it is impossible to say that the equitable title passed prior to 1887, or that these lands became taxable prior to that time.

NO LANDS DESCRIBED.

Another important fact and one, too, that cannot be reconciled with the theory of the Court below, that the title to these particular lands passed immediately upon the making of the Barney contract, is that no particular lands are described in the contract, and therefore the title to any particular tract, or tracts, could not possibly have passed by that instrument. The contract was merely an agreement to convey a certain quantity of land from a larger quantity, the title to which was thereafter to be acquired by the party agreeing to convey. The location, or exact description, of the lands to be conveyed was not known to either party to the contract; in fact it is

very doubtful if the lands, on which the taxes are claimed, were surveyed when the Barney contract was made.

The taxes involved in the first action in which the Barney contract was construed, were levied upon lands situated in the County of Waseca, the county in which the road terminated at the time the Barney contract was made. The agreement between the railroad company and Barney was for the sale of as many acres of land as the company should receive from the State for the construction of its road from Winona to Waseca. This left the quantity, or number of acres, to be conveyed uncertain. That was a matter to be thereafter ascertained and determined: and it was not so ascertained until the final decree of the Court, in March, 1887. The lands were to be selected by commencing at Winona and advancing westward on the line of the railroad, taking all of the lands of the company not required for railrord purposes, until the required number of acres was made up. It might be said that it was known and understood by the parties, that certain specified lands would pass under the agreement when Barney and his associates had fully performed their covenants; and for that reason, if the equitable title passed by the agreement, the

Court may have been justified in holding, as it did in that case, that such lands became taxable, or were conveyed by the contract. But this decision is no authority for saying that any lands are taxable, as having passed under the Barney contract, before it is definitely known whether they so passed or not Whether it would be necessary to go westward into Redwood County, a distance of more than one hundred miles, to make up the number of acres to be taken under the agreement, was wholly uncertain.

It was the sale of an uncertain quantity, or number of acres, to be selected and taken from a larger quantity. And in case of the sale of real or personal property, no right to any specific property passes until it is so specifically designated that it can be identified from all other like property. This identification may be made in a contract, or it may be left for subsequent determination. If any lands included in the Barney contract were sufficiently designated, so that the equitable title would pass to the parties of the first part, it was only the quantity, or number of acres, accruing to the railroad company for the constructed road from Winona to Waseca. As the agreement left the quantity, or number of acres, which were to pass for future ascertainment, it necessarily

left a portion of the lands undetermined. It merely pointed out the mode and manner of selecting them when the quantity should be ascertained. Now, as it was not definitely settled that it would be necessary to take these lands in Redwood County to fill the contract, until March, 1887, it cannot be said that the lands passed under the contract until that time. The railroad company, having obtained title to these lands in Redwood County, from the State, many years before the decree of the Circuit Court, directing their conveyance to the plaintiff in error, was made, could have sold and conveyed a good title to any third party, for the reason that there was nothing of record to show that they were included in the agreement, or that the contract of October 31st, 1867, extended to them. It did not, in fact, affect them until they were selected to fill the contract. Even though this contract had been a matter of record, a party purchasing any of these lands from the railroad company would have acquired a good title, and would have been protected by the Courts of the State; for the reason that the lands were not specified or described, and that the purchaser would not be chargeable with notice of the fact that his land was included in the contract from the railroad company to Barney and his associates.

How can it, therefore, be said that these particular lands were conveyed within the meaning of the Act of May 22nd, 1857, by the making of the Barney contract?

To show the fallacy of the Court's construction of the contract, with respect to the title to particular lands passing immediately without description under it, let us suppose the railroad company, prior to 1886, had sold all, or a part, of the lands in question, to individual purchasers. In that event, although, under the Court's construction, the title to these sold lands at the time of such sale was in Barney and associates, they could not have interfered with the rights of these purchasers. To have obtained the number of acres, Barney and associates were entitled to, under the contract, it would have been necessary then to have selected from the larger grant of the railroad company, other lands in lieu of those sold. If the equitable title to the lands sold passed immediately on the making of the contract without discription, then the equitable title to the lands selected also passed as of the date of the contract, and not when selected, although they were not included in, nor intended by the parties to be conveyed under the contract.

The question is whether or not the title to specific lands, thereafter to be acquired, and thereafter to be selected from a larger grant, can, without description, pass to the grantee, until such lands shall have been selected. It may be true, as the Court below, in Brown County vs. The Winona & St. Peter Land Company, 38 Minn., 397, says, that the decree of the Circuit Court directing the conveyance of these lands, created no new rights, but merely declared the rights created by the contract. But what was the right of Barney and his associates under the contract. It was not the right to demand the conveyance of any particular tract of land prior to the selection and designation of such tract in the manner specified in the contract, but was, in the language of the contract, the right to demand the conveyance "of as many acres of land heretofore granted by Congress to the State of Minnesota, as the said party of the second part shall receive from the State by reason of the construction of the portion of the Winona & St. Peter railroad heretofore constructed."

This right would have been of little or no benefit if the parties had not agreed in their contract as to the manner in which this indefinite and uncertain quantity of land could be selected and made certain by providing as they did in paragraph seven Folio 56, P. 30, of Record.

THE LANDS RETAIN EXEMPTION UNTIL CONVEYED.

But would the passing of the equitable title to the lands in question be such a conveyance as to deprive the lands of their exemption from taxation?

To determine this question, we should stop and consider the intention of the Legislature when it declared that the lands should be exempt from taxation until "sold and conveyed," and the meaning of the language employed to limit this period of exemption.

When this grant was made it was competent for the Legislature of the Territory of Minnesota to exempt the lands from taxation until they were cultivated, or fenced, or until they should be worth in the market a given price, or for any fixed period, or until the happening of any event. Having required the company to pay a tax of three per cent. upon its gross earnings, it was in consideration of the payment of such tax, for the Legislature, and not for the Court, to declare what act, matter or thing, should fix the period of exemption. The Legislature has fixed that time. The question for the Court is: Has that pe-

riod arrived? Was the act performed? Or had the matter or thing come to pass, which the Legislature declared should terminate the exemption, prior to the date these lands were assessed and taxed? If the argument of the Court below is sound, then, if the lands had been exempt from taxation for ten years, and within that time the Barney contract had been made, the lands would thereupon have become subject to taxation; or, to push the reasoning of the Court to its logical consequences, even if the lands had been permanently exempt, the making of the Barney contract would have put an end to the exemption.

If the Legislature intended that the exemption should continue only so long as the equitable title to the land remained in the railroad company, there would have been no necessity to have used the words "And conveyed." "Until sold" would have expressed, in law and in fact, the intention given to the act by the Court below. Having used words in conjunction with the words last quoted, which can only mean the actual passing of the legal title, and the Legislature having made the exemption dependent upon that fact, or upon the conveyance of the land, the Court cannot declare the lands taxable prior to

the happening of that event without violating the intention of the Legislature.

It will not do to say, that to hold the lands exempt from taxation until actually conveyed might have resulted in injury and loss to the State; that the railroad company could have sold the lands and retained the legal title thereto, thus depriving the State of the taxes. The inducement for such conduct would not be sufficient to such men as usually buy and cultivate land. Men ordinarily take the legal title as soon as they can obtain it and pay for it. But, in 1857, when this grant was made, the country in which the lands were situated was new and practically unsettled. Men who had the courage to settle here were not speculators nor wealthy men. In nearly every instance they were poor men seeking a home. The State at that time was inviting people, from all parts of the country, to take up and occupy the lands within its borders. These lands were then an open prairie. To break and fit them for cultivation required labor and money. Knowing these things, and knowing, too, that because of them the lands would be sold largely on contract and not conveyed until the settler had earned at least one-half the purchase price, the Legislature made the land exempt

from taxation until such time as the purchaser would be able to obtain the legal title; and accepted, in lieu of the tax upon the land, the three per cent. upon the gross earnings of the company.

This construction is supported by the subsequent acts of the Legislature of this State, granting lands to other railroads, wherein the period of exemption was made to continue, not until the lands were "sold and conveyed," but only until they were "contracted to be sold, conveyed, or leased."

See Act of March 2nd, 1865, granting lands to the Southern Minnesota Railroad Company.

Also the Act of March 3rd, 1865 granting lands to the Lake Superior and Mississippi Railroad Company.

Also the Act of March 3rd, 1866, granting lands to the Hastings, Minnesota River and Red River Railroad Company.

The language of these several acts, relating to the exemption of the lands granted, is as follows:

That whenever any lands heretofore or hereafter granted, etc., "shall be contracted to be sold, con-

veyed or leased, by said company, the same shall be placed upon the tax list by the proper officer for taxation as other real estate for the year succeeding that in which such contract for a sale, conveyance or lease thereof shall have been made, but, in enforcing the collection of the tax thereon, the title or interest of said company, or of any trustee or mortgagee thereof, shall be in no wise impaired or affected thereby; but the improvements thereon and all the interest of the purchaser or lessee therein may, and shall, in case of the default of the payment of the taxes upon such land, be sold to satisfy the same."

We call special attention to this provision which is found in the grants made subsequent to 1857, for the reason that it emphasizes the fact that the logical result of the Court's construction of the exemption clause of the Act of May 22nd, 1857, would have deprived the railroad company of the lands granted to it by the State, had Barney and his associates failed to comply with their agreement, and had the officers of the county, in which the lands were situated, proceeded upon the theory that the written contract was a sale and conveyance of the land, within the meaning of the act granting the land, and proceeded to assess and tax the same, and enforce the collection of such taxes by sale under the general laws of the State.

If default had been made in the contract by Barney and his associates, and the land had been taxed

and sold for the taxes, upon the theory that the covenant of the company to convey was independent of the performance of the covenants assumed by Barney and associates, the purchaser at such tax sale would have obtained a good title, for the reason that, according to the construction of the Court, the title to the land passed immediately upon the making of the Barney contract; and the railroad company would have been without any remedy whatsoever. From the express language of the exemption clause, and from all the facts and circumstances, we feel confident that the Legislature never intended this result; and that, no matter what the consequences to the State might have been, to tax these lands, prior to the happening of the event which the Legislature had fixed as the period of their exemption, is a violation of the contract between the Territory of Minnesota and the railroad company.

FIFTH ASSIGNMENT OF ERROR.

This Court in several cases has held to the effect, that the prohibitions contained in the fifth amendment to the constitution were intended to restrict the powers of the federal government and not to limit the authority of the states. We shall, therefore, not stop

to discuss the second and third assignments of error. The court below has held, however, that the assessment and taxation of the property of a citizen under Chapter 5, General Laws of 1881, without any provision for a notice, or an opportunity to appear and be heard in the assessment and taxation proceedings, is not in conflict with the provisions of the Fourteenth amendment to the federal constitution in respect to "due process of law," and this we have assigned as an error which we submit is a federal question and properly presented by the Fifth Assignment of Error.

The law under which the lands in question were assessed and taxed we claim is unconstitutional for the reasons: First, That it authorizes an arbitrary assessment of the property of the citizens and derpives him of the right to notice and opportunity to be heard in the assessment proceedings until the charge, or tax, which may be made the basis of taxing his property, has been created.

Second, That the sections of the General Statutes of the State of Minnesota, cited and claimed by the court below to cure this defect in the law of 1881, is not available to the property owner, until this charge, which may result in taking the property, has

been created and a fifteen per cent. penalty added; that the right to appear after a quasi judgment is obtained, as conferred by section 79, Ch. 11, General Statutes 1878, is not a right to appear generally, but is restricted to certain specified purposes, and this, therefore, is insufficient to meet the constitutional requirement of "due process of law."

Third, That the law of 1881 authorizes the assessment and taxation of both real and personal property; that sections 71 and 79, referred to, apply only to real property; that, under the law of the State, if the owner of personal property does not pay the tax assessed, which assessment is made without notice, his property is taken summarily by the sheriff and sold to satisfy the tax; that the two purposes of the act clearly show that it would not have been passed for the one and not the other. They are dependent purposes and, therefore, if the act is void as to one of these purposes, it is likewise void as to the other.

NOTICE AND AN OPPORTUNITY TO BE HEARD NECESSARY IN THE ASSESSMENT PROCEEDINGS.

The mandate of a despot is always simple and di-

rect. No checks stand in the way of his autocratic will. So with this act of 1881. It invests the county auditor—the book-keeper of the county—with a power to despoil and confiscate the property of the citizen, or, in the language of the Fourteenth Amendment to the Constitution, to deprive him of it without "due process of law;" without any of the usual checks or limitations. It says to the county auditor, "You shall enter the property on the assessment and tax books for the years omitted. You shall assess the same and extend all arrearages of taxes properly accruing against such property, with seven per cent. interest thereon, from the time when said tax would have become delinquent, and the same shall be extended against such property on the list for the next year. What a juggle of words, what a confusion of ideas, are here presented. In short, the county auditor assesses the property *nunc pro tunc*; that is to say, he determines its value. The next step required is "to extend all arrearages of taxes properly accruing against such property, with seven per cent. interest thereon, from the time when such taxes would have become delinquent." Take, for example, the year 1886. He says, "I find the value of that property to be for 1880 $1000. If it had been regularly assessed for 1880 and notice given to pay the same (Sections

71 and 72)—which notice was, however, never given —it would have become delinquent in June, 1881. I therefore extend against it all arrearages of taxes from June, 1881, and all penalties based on such imputed and constructive delinquencies. The phrase "extend all arrearages of taxes" is a palpable fiction, a legislative creation, a falsehood. There were no arrearages of taxes in the case supposed. For the first time in 1886, had the property been valued for taxation and the amount claimed by the State determined. Hence there is no such thing as an arrearage of taxes prior to the time when the same was first assessed by the auditor and the tax extended. Before that time there were no taxes against this property. Before that time there was no duty, nor opportunity afforded, the property owner to pay, and there was no duty or power to demand or to recieve payment on the part of the revenue collector.

For their own safety the people have stamped upon the right of private property, an inviolability which cannot be frittered away in this manner under the guise of taxation. It is in the assessment proceedings, under the law of 1881, that the charge is created that may be made the basis of taking the property of the citizen. It is therefore essential to the validity of this law, the tax levied under it, and for the protection of

the property rights of the citizen, that he should have notice of the proceedings and an opportunity to appear and be heard. But, under this law, he has neither. There is no intimation that notice nor an opportunity to be heard, is necessary. In other states where the question has been decided, the Courts uniformly hold, and all text writers on this subject say, that such notice and hearing is absolutely necessary to the validity of the assessment and, that a law authorizing a tax that does not require it before the valuation and assessment of the property is determined, is unconstitutional and void.

In his very excellent work on the subject of taxation Judge Cooley, page 363, says, "Tax proceedings are not in the strict sense judicial, but they are quasi judicial, and as they have the effect of a judgment, the reason which requires notice of judicial proceedings are always present when the conclusive steps are to be taken. Provision for notice is therefore part of the "due process of law" which it has been customary to provide for these summary proceedings; and it is not to be lightly assumed that constitutional provisions carefully framed for the protection of property rights, were intended, or could be construed to to sanction legislation under which officers might secretly assess the citizen for any amount in their discretion, without giving him an opportunity to contest the justice of the assessment."

When we consider the mode and manner of making the assessment and levying the tax under this law, the last sentence of this eminent author has peculiar significance, and bears directly upon the question under discussion. The same writer further says, "It has always been justly observed of taxing officers, that it would be a dangerous precedent to hold that any absolute power resides in them to assess, as they may choose, without giving any notice to the owner. It is a power liable to great abuse," and, it might safely have been added, "It is a power that under such circumstances would be certain to be abused."

Cooley on Taxation, Second Ed., pages 363, 364 and cases cited.

Desty in his work on taxation, page 567, says: "A tribunal invested by law with power to affect the property of a subject is bound to give such subject an opportunity of being heard before it proceeds. The rule is of universal application, and is founded on the plainest principles of justice. The power to tax is plenary, but taxation implies public interest, and also that the proceedings are in pais, in some of which the tax payers have a right to a 'hearing and any attempt to levy the burden in disregard of those principles must be inoperative. No person can be deprived of his property without a hearing, and this constitutional provision may apply to the assessment of taxes for

the support of the government. If a party is illegally deprived of opportunity for a hearing in opposition to the assessment, the defect is jurisdictional and cannot be cured. The legislature cannot confer power on a board to proceed without notice, since this would infringe that provision of the constitution which declares that no man shall be deprived of his property without due process of law.' Notice, or the means of knowledge, is an essential element of every just proceeding which affects rights of persons or property."

Darling vs. Gunn, 50 Ill., 428, was a case where the board of supervisors, acting under statutory authority, raised the assessment without notice to the plaintiff. The supreme court held, that where the board exercises the power given them by statute, to raise the assessment of an individual, he must have notice and an opportunity to be heard before it can be legally done. To the same effect see,

Clechorn vs Postlewait, 43 Ill., 428.

In the case of Patten vs. Green, 13 Cal., 325, the board of equalization increased plaintiff's assessment without notice. The supreme court held the action of the board void. In delivering the opinion of the court, Baldwin, Justice, says: "We decide that it would be a dangerous precedent to hold that any absolute power resides in the supervisor to tax lands

as they may choose, without giving any notice to the owner."

In County Commissioners vs. Union Mining Co., 61 Md. 545, the assessment was changed without notice to the defendant, and without its having an opportunity to be heard. This assessment was changed under a power similar to that vested in the board of review, and board of equalization, provided for in the statutes of Minnesota. On this point Stone, J., says: "The question now is, can this large and dangerous power of reassessing and largely increasing former valuations of property, be properly exercised, without notice to the parties to be effected? Upon reason, and the plainest principles of common justice, the answer would be in the negative. To say that the property of the citizen may be assessed to any value, however exorbitant, for the purposes of taxation, without notice to him, or an opportunity to be heard, would be anomalous in our system of law and at the same time revolting to all sense of right and justice."

In County of Santa Clara vs. Southern P. R. R. Co. 18 Fed. R., 385, it is said by Field, J.:

"That the clause of the constitution which forbids deprivation of property, without due process of law, places liberty under the same guaranty, and no one can be deprived of either property or liberty under the name of taxation, any more than under any

other name, by officers of the state, without notice of their proceedings and a right to be heard respecting their determination.

In county of San Matea vs. Southern P. R. R. Co., 13 Fed. Rep., on page 752 of the opinion, Field, J. says:

Due process of law in the proceeding is deemed to be pursued when, after the assessment is made by the assessing officers upon such information as they may obtain, the owner is allowed a reasonable opportunity, at a time and place to be designated, to be heard, respecting the correctness of the assessment, and to show any errors in the valuation committed by the officers. Notice to him will be deemed sufficient if the time and place be designated by statute. But whatever the character of the proceeding, whether judicial or administrative, summary or protracted, and whether it takes property directly or creates a charge or liability which may be the basis of taking it, the law directing the proceeding must provide for some kind of notice, and offer to the owner an opportunity to be heard, or the proceeding will want the essential ingredient of due process of law. Nothing is more clearly established by the weight of authority absolutely overwhelming, than that notice and opportunity to be heard are indespensible to the validity of the proceeding."

In Stuart vs. Palmer, 74 N. Y., 183, in construing a law authorizing assessments without notice, but providing that the assessments, with the names of the

parties assessed, should be returned to the proper officers and added to, and be made a part of, the annual tax for the ensuing year, and levied and collected in the same manner as other taxes are required by law to be collected, Earl, J., says:

"I am of the opinion that the constitution sanctions no law imposing such an assessment without notice to, and a hearing, or an opportunity of hearing, by the owners of the property to be assessed. It is not enough that the owners may, by chance, have notice, or that they may, as a matter of favor, have a hearing. The law must require notice to them, and give them the right to a hearing, and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of law is to be tested, not by what has been done under it, but what may, by its authority, be done. The Legislature may prescribe the kind of notice and the mode in which it shall be given, but it cannot dispense with all notice. The Legislature can no more arbitrarily impose an assessment for which property may be taken and sold, than it can render a judgment against a person without a hearing."

And again, he says, "No case, it is believed, can be found, in which it was decided that this constitutional guaranty did not extend to cases of assessments, and yet we may infer from certain dicta, that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has

sometimes been intimated that a citizen is not deprived of his property within the meaning of this constitutional provision, by the imposition of an assessment. It might as well be said, that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced, not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense as the judgment debtor is deprived of his by the judgment."

Notwithstanding the assessment was returned to the proper officers, made a part of the tax for the ensuing year, and collected as other taxes, and, that thereby, under the law, after the taxes had become delinquent, and before the sale of the property, the owner would have notice and a right to be heard, subject to the conditions named in the statue. yet this, under the foregoing decision is not sufficient. The owner is entitled, as a matter of absolute right, to notice and hearing, restricted only by the subject matter of the proceeding, wherein a charge, or liability against his property, is created, which may be made the basis of taking that property.

True, the basis for the assessment in this case was the benefit resulting to the property from a local improvement, and the assessment was made in proportion to that benefit, while in the general tax proceedings the basis of the assessment is the value of the propeity to be taxed. But this distinction cannot change the rule. The necessity for its existence and application is just as imperative in the one case as in the other. The proceeding affects the property of the citizen in the one case, as much as in the other, and in the same manner. The result in both cases is the same, and in both cases a charge is created that may be made the basis for taking the property.

Therefore, the citizen, in either case, is entitled to notice and and opportunity to be heard from the beginning to the end of a proceeding that may result in taking his property, and a law authorizing such a proceeding that provides for neither, is, for that reason, unconstitutional.

The general tax laws of Minnesota have, since the organization of the state, made ample provision, and fixed a time within which the tax payer may appear and object to the assessment of his property. The officers or boards, that shall hear and decide objections

to the assessment as returned by the assessors, are designated. Section 40, Chapter 11, Statutes 1878, requires the assessor to give 10 days' notice of the time and place of the meeting of the town board of review. Section 44, same chapter, fixes the time for the meeting of the county board of equalization. Under the provisions of this law, the tax payer has ample notice and an opportunity to be heard, and make his objections to the valuation of his own property, or that of any other person in his district. It is, no doubt, true, that because the tax laws of the State have always contained these provisions, it does not necessarily follow that the right to have notice, and appear and object, is an absolute right of the citizen. But it unmistakably shows that the legislative branch of the government regarded the right to notice, and to appear and be heard in such cases, to be of controlling importance to the owners of property as securing them against oppression and unjust exactions.

It is said, by the Court below, that, under Sections 75 and 79, Chapter 11, Gen. Statutes 1878, the tax payer has an opportunity to be heard and to set forth his objection to the tax, after the delinquent list is filed and published. While we shall discuss this proposition more fully later on, in passing we would

say that the opportunity here provided for an appearance, is restricted by Section 79, and the only purpose for which the citizen may appear, and the only defenses he can make are therein specifically named. And as before stated this is not sufficient to satisfy the constitution. The law affords a person notice and an opportunity to be heard, for certain purposes, after judgment and before property can be sold on execution; but, nevertheless, a judgment obtained in a judicial, or quasi judicial proceeding, where the person to be affected thereby had neither notice nor an opportunity to be heard, could not be sustained. On the same principle, the judgment of the assessor, board of review, or board of equalization, cannot be sustained without notice to the owner of the property to be affected thereby, and an opportunity coming after the judgment has been created and taxes returned delinquent and a penalty added, is not sufficient. No matter how much a person may feel aggrieved, or in fact be injured, by the act of the assessor in the valuation or assessment of his property, unless his objections come within the conditions prescribed in Section 79, Chapter 11, his right to appear is of no value. The reason for this restriction is very plain. The law has created boards of review and boards of equalization for the purpose of correcting and equalizing the

assessments. The tax-payer is given notice of the time and place of their meetings. An opportunity is afforded for a full hearing upon all questions pertaining to the valuation and assessment of his property, as well as that of his neighbors. In addition to this, although the statute does not expressly authorize it, yet, we are of the opinion, that he would have the right of appeal from the decision of the county board of equalization to the District Court to have the asment corrected. After making such ample provision for protecting the rights of the citizen against the errors, irregularities, partiality or fraud on the part of the assessor, it is not necessary under the constitution to extend the right to notice and a hearing, so as to allow the tax-payer, after the tax is levied and has become delinquent, an opportunity to appear generally and make any and all objections that he should, and has the right to make, before the several boards of equalization. To do so would make the assessment proceedings interminable, and delay the collection of public revenues. His right to notice, and to be heard, after the charge against his property has, in this proceeding been fixed, and the tax has been levied, is for that reason limited and restricted to certain specified purposes.

The right to be heard, contemplated by the constitution, and which all the authorities hold must be given, is not a qualified one, but absolute and general. It is not restricted to any particular purpose, but applies to the whole tax proceeding, from the beginning to the end, before the charge is created by the assessment, as well as after the tax is levied. The proceeding whereby lands, heretofore omitted are assessed, are *quasi* judicial, affecting the rights of the owner, and he is entitled to notice before any demand is established against him for such taxes. This is a part of the "due process of law."

The proceeding creates a liability which may be the basis of taking the property, and the law authorizing the proceeding must, therefore, "*provide for some kind of notice, and offer to the owner an opportunity to be heard.*" This, the law, under which these taxes were assessed and levied, does not do. It is, therefore, unconstitutional and void.

Cooley on Taxation, Second Edition, P. 363.

County of San Matea vs. S. P. R. Co., supra.

In Gatch vs. the City of Des Moines, et al., 63 Iowa, 718, the question was whether an assessment

for local improvements, authorized by the statute, without notice to the owner of property affected thereby, could be sustained. After stating the facts, Rothrock, C. J., says:

"It is sufficient to say that in ordinary methods of assessment and valuation of property for taxation, whether for general or special purposes, the authorities are very nearly uniform to the effect that it is necessary to the validity of the assessment, that the property owner should have notice and an opportunity to be heard."

To the same effect see The Trustees of Griswold College vs. The City of Davenport, 65 Iowa, 633, and

Butler vs. Supervisors of Saginaw Co., 26 Mich. 22.

Patten vs. Green, 13 Cal., 325.

Rhodes vs. Cushman, 45 Ind., 85.

Barahyte vs. Shepard and Voss, 35 N. Y., 238.

Hagar vs. Reclamation Dist., 111 U. S., 701.

Davidson vs. New Orleans, 96 U. S., 97.

Philadelphia vs. Miller, 49 Pa. St., 448.

Overings vs. Foot, 65 N. Y., 263.

Meyer vs. County of Dubuque, 43 Iowa, 592.

Tehman vs. Robinson, 59 Ala., 224.

Darling vs. Green, 50 Ill., 434.

State vs. Lindell Hotel Co , 9 Mo. App., 455.

Matheson vs. Town of Mazomanie, 20 Wis., 201.

Philips vs. the City of Stevens Point, 25 Wis. 594.

The cases above cited, and those from which we have quoted, establish beyond question, that the officer authorized to assess the property, the board of review, and the board of equalization, act judicially. They must examine the questions, and consider the evidence presented to them, and decide. They are vested with judicial description Their decision affects the property of the citizen, and, on many questions pertaining to valuation and assessment, is, by statute, made final, and the right to notice, and a hearing before the final conclusion of their proceedings, is part of the "due process of law," without which, under the constitution of the state and federal government, no person can be deprived of property. When the duties of these officers—their power to assess, review and equalize taxes—is vested in one person, he must, likewise, act judicially. The assessment of property for past years is placed solely within his discretion; he must decide on questions pertaining to its value, apportionment, and equalize the tax to be levied. He performs the duties of assessor, and constitutes three distinct *quasi* judicial tribunals, the board

of review, county and state boards of equalization, and possesses all of their plenary powers and judicial discretion. Therefore the right to notice, and an opportunity to be heard, before he creates a charge against omitted lands, which may be made the basis of taking them, is far greater, and more essential for the protection of the citizen and his property, than where this power is vested, not only in different individuals, but its exercise is divided among separate and distinct tribunals. We have no hesitancy, therefore, in expressing the belief that at some point in the proceedings to assess property, whether heretofore omitted or not, and before the amount of the charge is determined by the assessor, and where, as under this law of 1881, it is necessary to ascertain the the amount, quality, character and value of the land, as a means of apportionment and a basis for the tax, thestatute must provide for notice to the owner of the property to be assessed, and an opportunity be offered to make objections and to be heard. That, if the plaintiff in error on its large amount of property, or the private citizen on his farm or home, can be lawfully assessed and taxed, without notice and unheard, then it is competent for the state to abolish all notice and the right to be heard, and the property of every person can be assessed, and taxed, without notice,

secretly, unheard, and at the arbitrary will of the taxing officers.

It will be conceeded, that notice, and an opportunity to be heard, is essential to the validity of a judicial proceeding. Has the legislature the power, in any case, to dispense with it as it has attempted to do in the enactment of this law in 1881? The constitutional inhibition upon such a power resides in the provision of the federal and state constitutions, borrowed from the *Magna Charta*, to the effect that no person can be deprived of life, liberty or property without "due process of law," and this is a limitation upon judicial, as well as legislative, authority.

Lord Coke, upon the Construction of the Magna Charta (2 Coke's Inst. 51) says:

"By the law of the land is meant a general and public law, operating equally upon every individual in the community." In this case we have a general tax law prescribing the manner of assessing, and taxing, property of every individual citizen of our State, and another law prescribing a different, and purely arbitrary, manner of assessing the property of citizens whose property, through no fault of theirs, but through the negligence of the State's officers, has been omitted from taxation. The general law provides

every possible safeguard against the unlawful encroachment upon every possible right of the citizen, the other provides no safeguard whatever.

The property owner, whose property is regularly assessed under the general law, has the safeguard (of Section 33), that the assessor shall make his valuation as of a certain time within a definite period, and upon an actual view of the property. He has the further safeguard, (Section 39), of the town board of review, whose duty it is to review the assessment of property in such town or district, to examine, ascertain, and see, that all taxable properly placed on the list and duly valued by the assessor, and, in case any property, real or personal, shall be omitted by inadvertence, or otherwise, to place the same on the list, with the true value thereof, and to proceed to correct the assessment so that each tract, or lot, of real property, and each parcel, or class. of personal property shall be entered on the assessment list at the true and full value thereof; and the assessment of the property of any person shall not, it is expressly provided, be raised until such person shall be duly notified of the intent of the board to do so; and on the application of any person feeling himself aggrieved, the board shall review the assessment and correct the same in such

manner as shall to them appear to be just. He has the further safeguard, (Section 44), of the action of the county board of equalization, whose duty it is, whether any complaint of a grievance is made, or not, to examine and compare the returns of the assessment of property of the several towns, or districts, of the county, and proceed to equalize the same so that each tract, or lot, of real property shall be entered on the assessment list at its true and full value, with power to reduce, or raise, the assessment to such price or sum, as they believe to be full value thereof. He has the further limited right, (Section 79), if the tax is returned as delinquent, to show, (the burden being upon him), such irregularities as appear on the face of the ~~test~~ list.

There are thus four separate and distinct checks upon the power of the taxing officers, each of which is designed to secure fair, uniform and equal valuations; and to the benefit of each of which the property owner is entitled, and this at the very time when the valuation is to be determined, and when the data exists for a determination of such value.

But the Act of March 7, 1881, deprives the owner of the property omitted from taxation, altogether, or substantially, of all these safeguards. Un-

deniably, he is deprived, by the Act of 1881, of the safeguard or contemporaneous valuation upon actual view by the assessor.

He is also deprived, by that Act, of the remedial action of the town board of review; whose function it is to review the assessment of all the property in the town, or district, for the particular year for which they are acting, and who act at the time, with all the knowledge obtained from contemporaneous action, and necessary familiarity with the subject matter of such action. The town board of review has, by the statute two separate functions.

It has the power to make a specific inquiry into, and a determination of, the justice of any particular valuation, at the instance of the party aggrieved. It is also its duty to review, ex officio, the assessment for the whole town, or district, and place upon each tract, or lot, of property what in their judgment, is the true and full value thereof.

He is likewise, by the act of 1881, deprived of the remedial action of the county board of equalization, (section 44). The functions of the town board of review, and of the county board of equalization, are in the nature of successive revision, or appeals, from the action of the assessor, necessarily so, because the

power is given to change and modify that action.

Finally, if the assessors, acting upon an actual view, do the property owner injustice, if the town board of review fails to correct it, and if, further on, the county board of equalization fails to correct it, he may omit to pay his taxes, and then avail himself of the limited right, under section 79, chapter 11, Statutes of 1878, to contest the validity of the tax. When thus assessed under the general law, if the tax is not paid and his property is sold, it is taken from him, according to the "law of the land," or according to the the "due process of law" required by the fourteenth amendment of the constitution.

But this act of 1881 deprives the property owner altogether of all these safeguards, unless possibly the limited or partial safeguard of section 79, for it is probided by the act of 1881 that the county auditor, as a mere matter of book-keeeping, shall enter the property on the assessment and tax books for the years omitted, and shall assess the same. This county auditor is a mere book keeper, and it is not among the duties for which he was elected, or selected, to to fix upon the valuatiou of property. Certain it is, that, under the act of 1881, he may make such assessment sitting in his office and never leaving it; and the

records in this case show that the assessment was made in this manner. When this auditor makes this paper assessment, without actual view, the act of 1881 states further that he shall extend all arrearages of taxes properly accruing against such property, with seven per cent. interest thereon, that is, on the valuation fixed by him, from the time that the same would have become delinquent if they had been regularly assessed and returned as delinquent, and the sum thus charged as taxes, on the valuations thus fixed by him shall be extended against such property on the list for the current year. It then takes its place on the tax list for the current year.

It is obvious that the town board of review cannot act upon this assessment by the auditor and exercise either of their two functions above described in respect to the same, because they meet, (section 39), on the fourth Monday of June, and their functions are at an end prior to the time when the list goes into the hands of the auditor; and the law is well settled, of course, that they cannot act afterwards. It is equally clear that the county board of equalization, (section 44), does not act upon such assessment made by the auditor, because their functions are limited, by section 44, to the equalization of the list for the current

year, and the comparison and ascertainment of values for that year, and no authority is given to them to go back and revise the action of their predecessors, or of the assessors, one, three, five, fifteen, or fifty years before.

It thus appears that, of all the four fundemental safeguards, provided by the Legislature of Minnesota, for the security of property owners against unequal and unfair valuations, the act of 1881 saves only to the property owners, (if it saves that), the qualified rights secured by section 79, the burden of showing the inequality or unfairness, actual or relative, being upon him in the first instance. He is thusdeprived—First, of the official action of the assessors in making an assessment upon actual view, and, on the contrary, is subjected to a paper assessment by an officer, whose ordinary and legitimate functions do not embrace this duty. Second, he is utterly deprived of the revisory action, general and special, of the town board of review, and nothing is substituted in its place. Third, he is likewise deprived of the revisory, and corrective, action of the county board of equalization, and nothing is substituted in its place. Fourth, he is left, if with anything, at most with the limited right to go into court, only on the condition, however, that he

shall suffer his taxes to become delinquent, with penalties added, for the priveleges of contesting the justness and fairness of the valuation or assessment, with presumptions against him and the burden upon him, and this without any default of his own, for under the provisions of the law, (section 39), it is made the duty of the taxing officers to assess his real property at the proper time, and it is their duty to see that it is done. Will this court, under the circumstances, pronounce judgment that the valuation of the property in question, by the county auditor, under the act of 1881, has been ascertained, and fixed by an equal and uniform law, operating indiscriminately upon all persons and everywhere throughout the entire state, or that the tax has been assessed, and levied, according to "due process of law"? We are at a loss to see how this act of 1881 can be sustained, and the constitution stand.

But, if the view of this branch of case, entertained by the Court below, is acquiesced in by this Court, viz: that notice and an opportunity to appear, and be heard, in the assessment proceedings is not necessary to meet the requirements of "due process of law," where, as in the case of Hagar vs. Reclamation district, 111 U. S, 701, there was an opportunity to

appear, generally, and be heard after the charge has been created: let us inquire whether or not, the provisions of Sections 70 to 79, inclusive, Chapter 11, General Statutes of 1878, are sufficient to satisfy the rule as laid down by the text writers, and also by this Court in the case last above cited, and also in Davidson vs. New Orleans, 96 U. S., 97.

In his work on Constitutional Limitations fourth edition, page 441, Cooley says:

"Due process of law, in each particular case, means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards, for the protection of individual rights, as those maxims prescribe for the class of cases to which the one in question belongs.

This Court, speaking by Mr. Justice Miller in the case of Davidson vs. New Orleans: supra, states the rule of law as follows.

"That whenever by the laws of a State or by State authority, the tax, assessment, servitude, or other burden, is imposed upon property for the public use, whether it be for the whole State or of some more limited portion of the community, and those laws provide for the mode of confirming, or contesting, the charge thus imposed in the ordinary course of justice, *with such notice to the person, or such proceedings in re-*

gard to the property as is appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property, without due process of law, however obnoxious it may be to other objections."

Applying this rule, as defined by Judge Cooley and by Mr. Justice Miller, to the law under consideration, it will be found woefully deficient. The governmental power, here exercised, is that of taxation and "the settled maxims of law" will not "permit or sanction" the exercise of this power, in an arbitrary manner and without duly observing those safeguards which are essential to the "protection of individual rights," as the Legislature has attempted in the enactment of of this law of 1881. And if the notice, and opportunity to appear and be heard, authorized by the sections of the statue above referred to, is not as stated by Mr. Justice Miller, "appropriate to the nature case," the provisions of those sections are then insufficient and render the tax in this case in valid.

Taxes cannot be levied ex parte; every principle of constitutional government calculated to protect the rights of the citizen demands that the party to be affected by such a proceeding must have notice. The proceedings in this case were entirely ex parte,

until the charge or obligation was created, a fifteen per cent. penalty for its supposed non-performance added, and until another proceeding was commenced to enforce the performance of the supposed original obligation, and the payment of this penalty. If the property owner has notice, then, it is only by chance, and, so far as the penalty is concerned, is utterly valueless. If the tax is sustained, the whole of the penalty thereon must be paid. To the extent of the penalty, at least, is the citizen deprived of his property without "due," or any other, "process of law." For, unless, under the decision of the Court below in this case, he succeeds under the sections referred to, in showing that all, or a part of the tax is void, the penalty must be paid, although he has never been in default. If he fails in this respect, the penalty of fifteen per cent. stands, and fifteen per cent. of the property, taken to satisfy the tax, is taken without "due," or other process, and in violation of the Fourteenth Amendment of the Constitution of the United States.

INSUFFICIENCY OF NOTICE UNDER SECTION 71.

Is it reasonably probable that the notice required

by Section 71 will apprise the party, whose lands have been assessed for many years, of the proceeding that has been instituted and which is going on against him, whereby he may suffer a loss of his property? If not, it is insufficient and amounts to no notice whatever. The notice is given by publication after the taxes have been returned delinquent. Would a man who has paid his taxes, levied for the current year, and for every year that he has owned the property, be liable to discover from the publication of the delinquent tax list that his lands were being advertised for sale, and that, too, because of taxes the State neglected to assess at the proper time? Is it notice to him that his lands have been secretly assessed by the auditor, the taxes thereon levied, returned delinquent, and a final judgment therefore about to be obtained? Could a man, unconscious of any default in the payment of any portion of his ascertained share of the public expenses, be chargeable, under such circumstances, with a notice that a lien against his property has been created, to satisfy which, it is about to be sold? Could it be expected that, under such circumstances, he would examine the delinquent list to see if his name appeared thereon? The fact that his property was omitted, and is about to be sold for delinquent taxes, is not due to any neglect or default of

his, but to the neglect of the officers of the State. The omission, as we have said, may have occurred before he became the owner of the property and the most diligent search of the records would not discover it. Notice by publication, under these circumstances, is no notice whatever. It certainly does not meet the rule laid down by Mr. Justice Miller in Davidson vs. New Orleans; supra.

It must be borne in mind that the owners of land are not aware that before they purchased their property it may have escaped taxation for several years, nor are they aware that their lands are liable at any time to be assessed, by the auditor, and not by the officers elected for that purpose. It should be remembered also that, until after this assessment has been made, the tax levied, returned delinquent, and a penalty of fifteen per cent. added, the owner is in utter ignorance of the ex parte proceeding that has been going on, in which this charge has been created; and that, thereafter, it is only by accident that he may discover the fact before final judgment. All these things should be remembered, and considered, in connection with the question of the sufficiency of this notice. Nor should the Court lose sight of the fact that the notice, required under Section 71, was never intended to serve the

purpose to which it is here sought to apply it, as an expedient to avoid the necessity of notice of the proceedings in the first instance and to supply a radical defect in this law of 1881; that this notice was intended only for those whose property was regularly assessed and who had notice of the proceedings in which the assessment was finally determined and the tax levied. Under all these circumstances, therefore, we respectfully submit, it is not reasonably probable, from the publication of the notice provided for in this section, that the party proceeded against will be apprised of what is going on against him, or against his property. And for that reason it is inadequate, and insufficient to serve the purpose to which it is here sought to apply it, and is not appropriate in a case where lands have been omitted from taxation.

Davidson vs. New Orleans, supra.

In Happy vs. Mosher, 48 N. Y., 317, it is said with reference to due process of law:

"It needed not be a legal proceeding according to the course of the common law; neither must there be personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party pro-

ceeded against will be apprised of what is going on against him."

We are unable to find any decision that would justify the conclusion that, under the conditions and circumstances attending the assessment and levy of taxes under this law, the publication of the delinquent tax list is sufficient to charge a man with notice, or that it would constitute legal notice. It, unquestionably, is sufficient notice in the case of taxes for the current year, assessed under the general law, where the property owner has had notice and an opportunity to appear in the assessment proceedings from its inception until the tax and the lien therefor has been created and he has made default in payment. But this does not prove that the publication of the delinquent tax lists is appropriate notice, or any notice whatever, in the case of omitted taxes, where the property is assessed secretly, and the tax becomes delinquent without any default on the property owner.

THE RIGHT TO APPEAR UNDER SECTION 79 INADEQUATE.

But it is also claimed, that the right to appear,

after the publication of the delinquent list, provided for by Section 79, Chapter 11, is sufficient to satisfy this constitutional requirement. The fallacy of this position lies: First—In the fact that the opportunity to appear is not afforded until the charge against the land has been created, and to that charge, or *quasi* judicial judgment, there has been added a penalty of fifteen per cent., against which there can be no defense, if the whole of the tax is sustained; and, Second—In the distinction between the nature and extent of the right contemplated by the constitution and the one afforded by this section.

Under this section, the tax payer has not an unqualified right to appear generally and for any purpose. His appearance must be in the nature of a special appearance; in other words his right to appear at all, and be heard, is qualified and restricted to certain specified purposes, and limited to certain defenses. To his right to appear at all is attached the condition that, he must show that the act or omission of which he complains has, or will, result in his prejudice, otherwise he will not be heard.

We insist, this is not sufficient to satisfy the constitutional guarantee that no man shall be deprived of his property without a hearing, and we still maintain

that the right guaranteed by the constitution is absolute, unqualified, as broad as the proceeding itself; one that will enable a man to review the assessment and inquire into every question pertaining to the merits of the claim, and the regularity of the proceeding in which it was created, without price or condition; one that will enable him without condition, to inquire into the legality, or the regularity, of every step in the proceeding, from the beginning to the end. This is essential to the security of the tax payer, and is afforded where lands are taxed under the general tax laws of the state. Less than this will not constitute "due process of law." In support of the proposition, "that in the proceeding to enforce the collection of delinquent taxes, a full opportunity is given the owner of the land to be heard, not before a board of review, but in a judicial tribunal, surrounded and protected by all the safeguards that pertain to judicial proceeding," the Court below cites several cases. We have carefully examined these, and it is a noticeable fact, that, in none of them, was the question of the sufficiency of the notice, and opportunity to be heard, raised or discussed. What is there said bearing on this question is mere *obiter dictum*, and this we contend, favors our position, that the right secured by this section is inadequate to meet the de-

THE LAW ASSOCIATION OF PHILADELPHIA.

mands of the constitution.

In Commissioners of St. Louis County vs. Nettleton, 22 Minn., on page 358, the court says:

"It was the intention of the act of 1874, (which contains this same section), to require the owner of property to interpose, in these proceedings, every defence or objection to a sale of the land for taxes *appearing on the list filed* which he may claim, so that all such defences or objections may be tried and disposed of, and a conclusive judgment affirming the taxes and the right to sell them, entered, and a good title passed to the purchasers at the sale."

It will be seen that the defenses the property owner may interpose are those, only, which appear "*on the list filed*." In other words, he must accept the issue tendered by the delinquent list and can raise no others.

The question decided in County of Chisago vs. St. Paul & Duluth Railroad Company, 27 Minn., 109, was one of jurisdiction. No other question was considered. The court, by Gilfillan, C. J., says:

"It is the policy of the statute, that every objection to the enforcement of the taxes *appearing on the list filed* should be litigated and decided."

In Fleming vs. St. P. & D. R. Co., 27 Minn., on

page 111, the Court says: "No error, irregularity or omision, prior to filing the list, affects the jurisdiction of the court." And in County of Olmstead vs. Barber, 31 Minn., 261, the Court says:

"But under the law now in force for enforcing payment of taxes, and under which these proceedings are brought, *no omission of anything required to be done, before the filing of the list with the clerk, is material, unless the party objecting was prejudiced thereby*, and the taxes against the land were partially, unfairly, and unequally, assessed, and then only to the extent to which the tax is greater than it ought to be."

It is clear from these decisions, that, as a condition precedent to his right to be heard, the taxpayer, in any event, must show that he has actually been prejudiced on account of that which has been done, on account of any omission or neglect to do that which the law requires to be done, prior to the filing of the list. This is not always possible in proceedings which affects property, and it is practically impossible where the assessment proceedings have been carried on as a star chamber proceeding. The only purposes for which he may appear and can be heard, and the only defenses that are available, unconditionally, are those which appear upon the lists as filed with the clerk for publication.

We have heretofore shown why these restrictions were placed upon the right of the tax payer after the assessment was made, and after the proceedings before the board of review and equalization had closed. Hence the provisions of section 79, in effect curing all defects in these proceedings, and limiting his right to be heard to such defenses as appear upon the face of the list filed with the clerk. It would be just as competent, and as much within the scope of legislative power, to make the right of a defendent, to appear in an action upon a promissory note, conditional upon his first showing, that the proceeding, instituted against him to enforce the payment of the note, will result to his prejudice, or to limit his defenses in an action of that kind, or to qualify his right to appear, as it would be for that body to authorize the assessment and sale of a person's land, without affording him, at some stage in the proceeding, an opportunity to be heard generally, and for any purpose, and have the assessment reviewed and corrected, without any precedent conditions whatever.

None of the cases cited by the court below in its opinion, or those we have examined, go to the length of holding that the taxpayer is not entitled to have the valuation and assessment of his lands, for either

local or general purposes, corrected, and if necessary, reduced, or that hold that the right to appear specially, and for just such purposes as the legislature may see fit to allow, is "due process of law." The right to have the valuation and assessment revised, corrected and equalized, is denied the citizen whose lands are assessed under the law of 1881. The judgment of the auditor respecting the valuation and assessment of property is rendered in a quasi-judicial and ex parte proceeding, and is as final as that of the board of review or board of equalization. Herein lies the distinction between this case, and the cases where the law authorizing the assessment does not require notice until proceedings are instituted to enforce the collection of the tax, wherein he may appear and "set forth by way of defense, *all his grievances.*"

This distinction is clearly recognized in Hagar vs. Reclamation District, No. 108, 111 U. S., 710, where Justice Field says:

"In some states, instead of a board of revision or equalization, the assessment may be reviewed by proceedings in the courts, and be there corrected if erroneous, or set aside if invalid; or objections to the validity or amount of the assessment may be taken, when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard re-

specting the assessment which can be deemed essential to render the proceedings due process of law."

And again he says:

"The assessment under consideration could, by the law of California, be enforced only by legal proceedings and in them any defense, going either to its validity or amount, could be pleaded. In ordinary taxation, assessments, if not altered by a board of review or equalization, stand good, and the tax levied may be collected by a sale of the delinquent's property. But assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suit, and, of course, to their validity it is essential that notice be given to the taxpayer, and opportunity be offered him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances."

In Reclamation District vs. Evans, 61 Cal., 104, cited by Justice Field, in the opinion from which we have just quoted, the supreme court of California says:

"No assessment against any tract of land can be enforced except by action, to which the owner of the tract must be made a party. (Pol. C., Sec. 3466) The judgment appealed from was rendered in such an action, and to such an action the code does not limit the defenses."

And again the court says:

"It cannot be material, however, that the land

owner had no notice, before the proportional benefit to his land was estimated by the commissioners, if in the subsequent action he has had his day in court, with full opportunity to contest the charge before it was declared a lien upon his land, or a judgment to be collected out of his general property."

We feel confident that the examination of the cases, holding that notice and a right to appear after a charge has been created, or the assessment made, is sufficient to satisfy the constitutional requirement of due process of law, are all based upon the fact that the taxpayer has actual notice of the proceeding to enforce the collection of the tax, and the right to appear therein generally, and be heard respecting the assessment, without any conditions, restrictions or limitations whatever, as to the kind or nature of the defenses he may make; and less than this would not afford to the citizen that protection guaranteed by the constitution, or "satisfy those maxims prescribed for the class of cases to which the one in question belongs."

Tehman vs. Robinson, 59 Ala., 224.

Wheeler vs. Mills, 40 Barber, 644.

THE ACT INVALID AS TO PERSONAL PROPERTY CANNOT BE SUSTAINED AS TO REAL PROPERTY.

The act of March 7, 1881, authorizes the assessment and taxation of both real and personal property. It will not be denied that a law authorizing the assessment and taxation of property and the taking of the property, or a portion thereof in payment of the tax, without notice and without an opportunity, to be heard, would violate the constitutional requirement of "due process of law." The authority for the collection of the tax assessed under this act is created by directing, as it does, that taxes so assessed shall be extended and collected as other taxes, meaning that they shall be collected under the provisions of the general tax laws of the state.

The assessment being made without notice, taxes on personal property would, therefore, be returned delinquent and must be collected, if at all, under the provisions of the general law, as this act directs. An examination of the general tax laws of Minnesota for the collection of taxes on personal property will disclose the fact that there is no notice or opportunity for a hearing after the tax becomes delinquent or until

the officer arrives with a warrant for its amount, which, if not paid on demand he proceeds to satisfy by levy or sale.

Here, then, personal property is assessed in an ex parte proceeding, the taxes returned delinquent, a warrant for their amount issued; if not paid on demand the property is taken and sold to satisfy the tax with costs; and all this is authorized by this law to be done without notice and without an opportunity to appear and be heard (section 58, chapter 11, statutes of 1878, as amended by section 5, chapter 2, laws of 1885); therefore, we need not say to this Court, that upon the conceded facts so far as, this law authorizes the assessment and taxation of personal property, it is clearly and unquestionably in conflict with the Fourteenth Amendment of the Constitution of the United States. If this is so, it is important to ascertain how this invalidity affects this act as to the taxation of real property.

It will be observed that this does not raise the question of a part of an act being unconstitutional and another part valid, they being entirely independent parts of the same act. Here the entire act is void as to part of the general purpose for which it was created

and (assuming that suitable provision for notice and hearing exist under the general law before real estate can be sold for taxes) valid as to the remainder of that purpose, and that, therefore, the rule that one whose interests are not affected by the part of an act, held invalid, will not, on that account, be allowed to ask that the whole law be construed to be unconstitutional, does not apply. In such a case we understand the rule to be that, where it is evident from a contemplation of a statute, and the purpose to be accomplished by it, that it would not have been passed at all except as an entirety, or where the purposes of the statute are so connected in meaning that it cannot be presumed the Legislature would have passed it for one purpose and not the other, or where the general purpose of the Legislature will be defeated if it shall be held valid as to some cases and void as to others, that then, and in either case, the entire act must be held inoperative and void for any purpose whatever.

Cooley's Const. Lim., 215, 219.

Knowlton vs. Supervisors of Rock Co., 9 Wis. 410.

State ex rel. vs. Com., 5 Ohio St. 497.

Warren vs. Mayor & Ald., 2 Gray (Mass.), 98.

Jones vs. Robinson, 8 Gray (Mass.), 338.

Monroe et al. vs. Collins, 17 Ohio, 689.

Garrard Co. Court vs. Navigation Co., 10 Am. L. R. (U. S.), 160.

Slauson et al. vs. Racine, 13 Wis. 444.

State ex rel. Walsh vs. Dousman, 28 Wis. 547.

We insist, therefore, that this law of 1881 is clearly written within the rules above referred to, and which are supported by all the authorities above cited,

It is a well known fact that, on account of concealments and false returns, a vast amount of personal property annually escapes taxation. All real property being listed in the office of the county auditor, it is not so apt to be omitted, but in some instances it is, and this law, therefore, authorizes the taxation of both classes. This is the general and only purpose of the act—the taxation of both real and personal property that has heretofore escaped taxation. Is it not evident, therefore, from a contemplation of the statute and the purpose to be accomplished, that it would not have been passed at all except as an entirety, or except for the purpose of taxing all property that has heretofore escaped taxation? We think it is. Or again, would it not defeat the general pur-

pose of the act to hold it valid as to the taxation of one class of property and invalid as to the taxation of another class? Most certainly it would.

The fact that property is divided into two classes, and that the law makes both classes the subject of retrospective taxation, does not authorize the separation or division of the main and only purpose of the act. To do so would, in effect, be holding that the law was enacted for more than one purpose, that these purposes were entirely independent of each other, and that, where one class of property escapes taxation it can thereafter be taxed, but that where another class of property has likewise escaped taxation, it cannot be taxed, and may continue to escape taxation. If the law authorized the taxation of only real property that has heretofore escaped taxation, it would thereby, by implication, exempt every other class from taxation, and therefore be unequal and unconstitutional; therefore the general purpose of the act is indivisible—it is made so by the constitution of the State (Sec. 3, Art. 9, Const.), and if the law is invalid as to the assessment and taxation of one class of property, it must be invalid as to all classes of property.

Again, if it were possible to construe it as to divide the general purpose of the act, and to hold that it was intended to accomplish two separate and independent purposes, viz; taxation of real and personal property, and that it may be void as to one of these, but, nevertheless valid as to the other, then we insist that the provisions of the constitution which require uniformity of taxation, and which says that, "laws shall be passed taxing all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise, and also all real and personal property, according to its true value in money," (Sec. 3, Art. 9, State Const.), is clearly and unmistakably violated by such a construction.

City of Zanesville vs. Richards, 5 Ohio St., (U. S.), 589.

For the same reason, an act that would authorize a tax that would discriminate in favor of one class of property and against another class, both classes of property being made the subjects of taxation by the constitution, would be invalid and inoperative as a whole, because, violative of the section of the constitution above referred to.

In City of Zanesville vs. Auditor of Muskingum

Co., *supra*, the sixth section of the act incorporating the City of Zanesville authorized the council to exempt certain property not laid off in town lots, from taxation. In construing this section, the Supreme Court, of Ohio, by Ramley, C. J., says:

"The public burdens are made to rest upon the property of the State, and, whenever money is to be raised by taxation, the positive injunction is, that laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property, according to its true value in money; without express authority of law, no tax, either for state, county, township, or corporate purposes, can be levied, and we see no reason to doubt that this section of the constitution is equally applicable to, and furnishes the governing principle for, all laws authorizing taxes to be levied for either purpose. The great object of the provision was to secure equality and uniformity in the imposition of these public burdens."

It will be observed that the section of the constitution construed in this opinion is identical with the one quoted above from our own. There is, therefore, no escape from the conclusion that the purposes of the act of 1881 are, by the constitution, made one and inseparable, and that, if it is void as to one of these purposes because it results, in its operation, in depriving the citizen of his property without "due process

of law," it, of a necessity, is a nullity as to the other.

The correctness of our position on this point is practically conceded by the Court below (see record, page 8, folio 16); but the Court claims we assume "that personal taxes could only be collected by proceedings under the general tax law" and that in this we are in error. In reply we would respectfully submit that this is not an assumption on our part, but the statement of a fact. The Court does not pretend to claim that there is any statute in our State, under which personal taxes assessed under the law of 1881, could be enforced without violating the Fourteenth Amendment to the Federal Constitution. It assumes, however, that a personal property tax assessed secretly, arbitrarily, without notice and without the revisory action of the town board of review and the county board of equalization, is "a valid tax, constituting a statutory liability against the property owner to the State, and that in the absence of any law providing any other method might be enforced by an ordinary personal action." The recovery of a personal property tax in a personal action, or in any statutory manner, cannot be had without proof of such proceedings as are essential to the making out of a legal tax and a default in payment, and as such proof could not

be made where personal taxes have been assessed under this act of 1881, there would be no "statutory liability" for which the action in question could be brought.

Cooley on Taxation, 2nd Edition, page 436.
Lockhart vs. Houston, 58 Texas 317.
St. Anthony et cetera Co., vs. Greely, 11 Minn., 321.

Whether or not the Court's conclusion is right depends upon the question of whether or not a personal property tax, assessed and levied in the manner authorized by this law is a valid tax. The Court cites no case to support its premise, and we believe none can be found. The authorities heretofore cited by us on this point all hold to the contrary. The Court is likewise in error in saying that our objection was not to the act of 1881, providing for the assessment of these taxes, but to the supposed inapplicability of section 58 for the purpose of enforcing them. Our objection was, and is, that the tax cannot be legally assessed without notice and an opportunity to be heard, and where there is no legal assessment there can be no legal liability for which the State can maintain any kind of an action, and this law of 1881, directing in what manner the personal property tax

assessed under it shall be collected is responsible, if in following the direction of the act the property of the citizen is taken under the general law in payment of the tax without "due process of law."

In conclusion we respectfully submit, that the assessment and taxation of the lands of the plaintiff in error for years prior to their selection and conveyance is a violation of the contract between the State and the railroad company, whereby the lands were to be exempt from taxation until "sold and conveyed,"

That the assessment and taxation of property under the act of March, 1881, being made without notice or an opportunity to be heard, and the provisions of sections 71 and 79, chapter 11, general statutes of 1878 not being sufficient in the case of omitted taxes to satisfy the requirements of "due process of law," the act under which the taxes in this case were assessed is, for that reason, unconstitutional and void. All of which is respectfully submitted.

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